

No. 17038

United States
Court of Appeals
for the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE CO.,

Appellant.

vs.

VIRGIL N. LEE,

Appellee.

Transcript of Record

NOV 2 1960

FRANK H. SCHMIDT

Appeal from the United States District Court
for the District of Oregon.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Pretrial Order.....	13
Answer	7
Attorneys, Names and Addresses of.....	1
Certificate of Clerk.....	169
Complaint	3
Ex. A—Insurance Policy.....	6A
Docket Entries	166
Findings of Fact and Conclusions of Law.....	20
Judgment Order	24
Notice of Appeal	25
Opinion	19
Order for Extension of Time to Docket Appeal	30
Order Re Transmittal of Exhibits.....	30
Pretrial Order	8
Statement of Points to Be Relied Upon.....	28
Summons	7

INDEX	PAGE
Supersedeas Bond	25
Transcript of Proceedings April 13, 1959.....	31
Defendant's Motion for Nonsuit.....	82
Witnesses, Defendant's:	
Meyers, Osburn R.	
—direct	98
—cross	111
—redirect	113
Rognlie, Leo H.	
—direct	83
—cross	97
Ross, Raymond R.	
—direct	115
Wetzel, Frank T.	
—direct	130
—cross	132
Witnesses, Plaintiff's:	
Hust, Cecil I.	
—direct	66
—cross	69
—recalled	75
Lee, Virgil N.	
—direct	32
—cross	54, 71

Witnesses, Plaintiff's—(Continued)

Nadeau, Neil D.

—direct 77

Pruitt, Don

—direct 78

—cross 82

Transcript of Proceedings April 19, 1960..... 144

Witnesses, Plaintiff's:

Howatt, Frank

—direct 156

—cross 161

Overman, Eugene J.

—direct 147

—cross 151

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In the United States District Court for the
District of Oregon

Civil Action No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE COMPANY,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant, alleges as follows:

I.

That at all times herein mentioned the plaintiff
is a resident and citizen of the State of Oregon.

II.

That the defendant is a corporation existing under
and by virtue of the laws of the State of Utah, and
is qualified to do business in the State of Oregon.

III.

That the amount in controversy herein, exclusive
of costs and interest, exceeds the sum of \$3,000.00.

IV.

That at all times herein mentioned, Walter A.
Reklau was the general agent for the defendant com-
pany, with offices in Portland, Oregon, and that O.

R. Myers, Jr., and Leo H. Rognile were agents for said company in the State of Oregon.

V.

That the defendant company acting through its aforesaid agents, induced the plaintiff to purchase a policy of insurance, and that said policy is dated January 20th, 1956, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof.

VI.

That the said defendant, through its agents, represented to the plaintiff that the policy of insurance hereinbefore referred to was in fact and effect a company ownership policy and that dividends of the company beginning with the third year of the existence of said policy would be paid upon the amount previously paid as premiums, with each annual premium being \$1,000.00, and that said dividends in the past had been approximately twenty per cent or more, and that within eight years from the time that the plaintiff purchased said policy that the dividends would be more than were sufficient to pay the annual premium thereon, and when said policy was issued to the plaintiff he was again assured by the defendant company through its aforesaid agents that said dividends would be paid and that he had no cause for concern and again told the plaintiff that the dividends of the company in previous years had been in excess of twenty per cent, and likewise told the plaintiff that said dividends were calculated on the basis of the annual premiums

accumulated, and said dividends being paid the beginning of the third year on the premiums paid beginning with the first year.

VII.

That in January of 1958 the plaintiff inquired of the company defendant with respect to said dividends but was then informed that said policy provided for no such dividends and that he would not be paid in accordance with the formulae stated by the company's agents.

VIII.

That the plaintiff has paid three premiums or a total amount of \$3,000.00.

IX.

That the defendant through its agents represented to the plaintiff that there would be dividends in the approximate amount of twenty per cent paid on the annual premiums of \$1,000.00. That said representation was false and was material to the plaintiff. That the agents of the defendant company knew that said representations were false and intended that the plaintiff should act upon said representations and purchased said policy. That the plaintiff was ignorant of the falsity of said representations and relied upon its truth and had a right to rely thereon, and has been damaged as the result thereof in the amount of \$3,000.00, with interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1956, with interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1957, and with

interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1958, until paid.

X.

That said representations were wilful, deliberate and malicious and made with the intent to defraud the plaintiff, and that the plaintiff is entitled thereby to the sum of \$10,000.00 as punitive damages.

Wherefore, your plaintiff prays for a judgment of this Court against the defendant, for general damages in the sum of \$3,000.00, with interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1956, with interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1957, and with interest on \$1,000.00 at the rate of 6 per cent per annum from January 20th, 1958, until paid; for punitive damages in the amount of \$10,000.00, and for the plaintiff's costs and disbursements herein incurred.

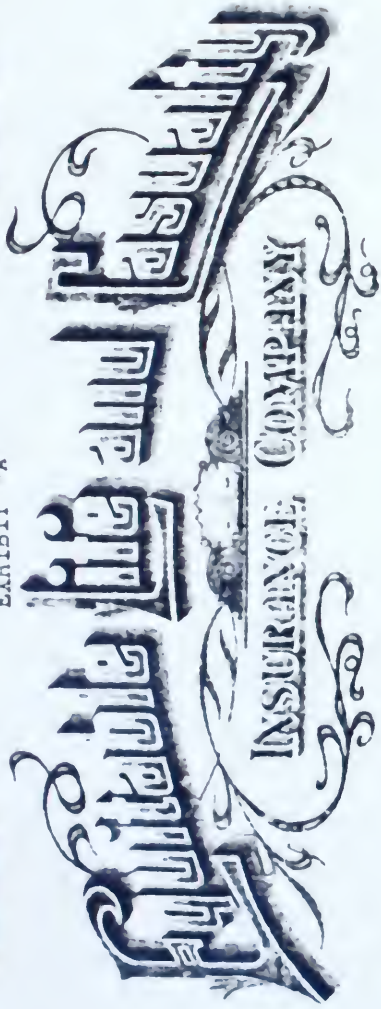
/s/ ROLLIN E. BOWLES,

Of Weiser, Bowles & Young,
Attorneys for Plaintiff.

NUMBER

FACE
AMOUNT

EXHIBIT "A"



AN OLD LINE CAPITAL STOCK LEGAL RESERVE COMPANY

(Hereinafter Called the Company)

Name of Insured	PGILL, LEE	Issue Age	Date of Issue	AN 20	1916
	Annual	Semi-Annual	Quarterly	Monthly	
Total Premiums:	\$ 1,000 00	\$ 2,000 00	\$ 265 00	\$ 91 70	

BENEFICIARY:

FLORENCE K. LEE, WIFE

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY WILL PAY to the beneficiary the Face Amount of insurance, together with any dividends and interest thereon at not less than 3% a year compounded annually, immediately upon receipt of due proof of the death of the insured while this policy is in force, subject to the terms and provisions hereof.

PROFIT-SHARING
THIS POLICY SHALL PARTICIPATE IN THE PROFITS OF THE COMPANY. Such profits shall be composed of (1) Savings in Mortality, (2) Profit from Lapses, (3) Interest in Excess of Reserve requirements, and (4) Savings from Expense Loadings and in Economy of Management. Dividends are payable as provided in the paragraphs headed "DIVIDENDS" on page 2 hereof.

CONSIDERATION. This policy is issued in consideration of the application herefor and of the payment of the premiums as herein provided for 20 full years unless the premium-paying period is shortened by the applications of dividends and accumulated interest thereon.

All that is printed or written by the Company on this and the following pages hereof is made a part of this contract.

The Company has caused this policy to be signed by its President and Secretary to be effective as of the date of issue hereof.

F. C. Gill
 President

Secretary

20 PAYMENT LIFE
 A Profit-Sharing Policy



GRADED DEATH BENEFIT IF INSURED IS UNDER AGE 1. If the age at issue of the insured is under three years, the death benefit payable hereunder for the first 3 policy years shall not be the face amount but shall be the amount indicated in the following table according to the policy year in which death occurs.

Age at Issue of Insured	Cash Benefit: per \$1,000 of Face Amount if death occurs in policy year		
	1	2	3
0	\$100-120*	\$ 500	\$ 750
1	900	750	1,000
2	750	1,000	1,000

*For age at issue 0 the Death Benefit is \$100.00 per \$1,000 of face amount if death occurs in the first 6 months of the policy year and is \$250.00 if death occurs in the second 6 months.

NON-FORFEITURE PRIVILEGE IN EVENT OF DEATH. Payment of premium the following benefits shall apply if the premium remains unpaid and the Automatic Premium Loan provision is not applicable:

(a) **AUTOMATIC PAID-UP LIFE INSURANCE.** Upon expiration of the period of grace this policy will be automatically continued as a non-participating paid-up life insurance, payable at the same time and under the same conditions as this policy, which the Cash Value at date of default, less the amount of any indebtedness hereon, will provide as a net single premium at the insured's attained age nearest birthday at such date. The election of the Cash Value option will revoke the automatic application of the Paid-Up Life Insurance privilege hereunder, and in such case no deduction will be made for the value of any such Paid-Up Life Insurance for the period elapsed before such election is made. The Payor may obtain a loan on such Paid-Up Life Insurance subject to the loan provisions hereof, or may surrender such insurance within thirty-one days after any anniversary of this policy for its present value as at such anniversary less any indebtedness hereon.

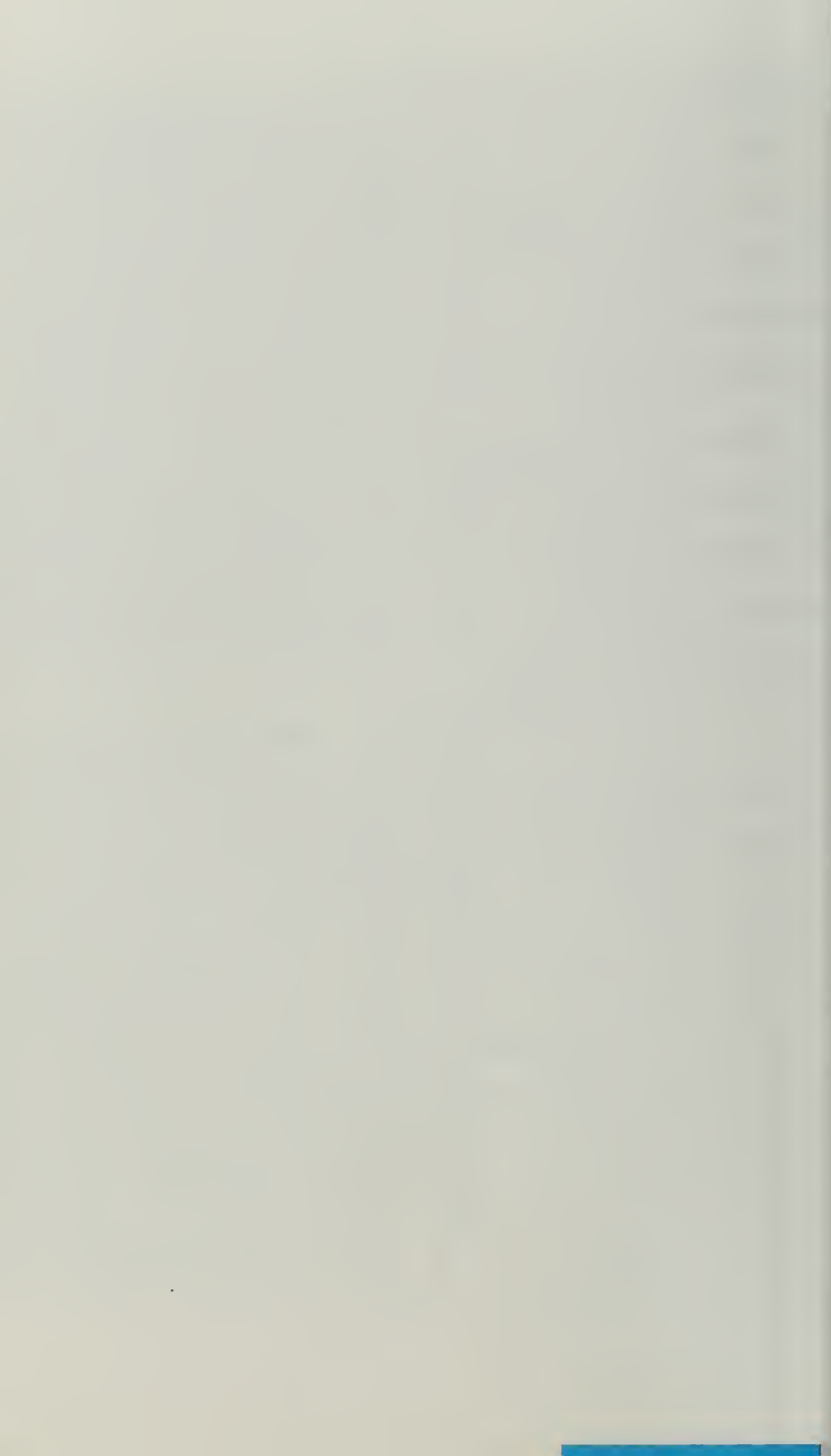
(b) **CASH VALUE.** After premiums have been paid and the policy continued in force for the period for which the cash value is shown in the Table of Cash Values, after default in premium payment to surrender this policy and all claims hereunder and receive its cash value at date of default less any indebtedness hereon. The Cash Value shall include any outstanding dividends, including dividend accumulations, and the present value of any outstanding paid-up insurance purchased by dividends. If this policy shall have become paid-up by completion of all premium payments, it may be surrendered within thirty-one days after any anniversary hereof for its present value as at such anniversary, less any indebtedness hereon.

TABLE OF COMPUTATION. The Cash Values are \$1,000 of face amount on any anniversary of this policy in the event of the then present value of the future life insurance benefits guaranteed by this policy for each \$1,000 of face amount, exclusive of any benefits in the event of total and permanent disability or death by accident, over the then present value of a series of annual amounts each equal to the non-forfeiture factor shown in the Table of Cash Values, beginning on each anniversary and continuing on subsequent anniversaries for the remainder of the period during which premiums are payable hereunder. The values so computed are taken to the next higher dollar for each \$1,000 of face amount. Such Cash Values and the Paid-Up Life Insurance net single premiums and present values are calculated on the basis of the Commission's 1941 Standard Ordinary Mortality Table with interest at the rate of three per cent per annum. All such computations are made on the assumption that the deaths in any policy year occur at the end of that year. The Cash Values and paid-up non-forfeiture benefits hereunder are not less than the minimum values and benefits required by or pursuant to any applicable statute of the State in which this policy is delivered.

The values in the tables on pages 3 and 4 are computed on the assumption that the policy has been in force and premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, and that there is no outstanding paid-up insurance purchased by dividends, nor outstanding dividends nor dividend accumulations. If the face amount under this policy is other than \$1,000, the values shown in these tables for Cash, Loan and Paid-Up Life Insurance will be applied pro rata. Any value available in event of default in premium payment due at any time other than on the policy anniversary will be calculated with allowance for the lapse of time and the payment of fractional premiums in the policy year. An extension of these tables for years past shown will be furnished by the Company upon request.

TABLE OF CASH VALUES—Per \$1,000 of Face Amount

Age at Issue	End of Policy Year												New-Policy	Performance																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																				
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0	87	91.8	96.8	102	108	114	121	128	135	142	150	158	166	174	182	190	198	206	214	222	230	238	246	254	262	270	278	286	294	302	310	318	326	334	342	350	358	366	374	382	390	398	406	414	422	430	438	446	454	462	470	478	486	494	502	510	518	526	534	542	550	558	566	574	582	590	598	606	614	622	630	638	646	654	662	670	678	686	694	702	710	718	726	734	742	750	758	766	774	782	790	798	806	814	822	830	838	846	854	862	870	878	886	894	902	910	918	926	934	942	950	958	966	974	982	990	998	1006	1014	1022	1030	1038	1046	1054	1062	1070	1078	1086	1094	1102	1110	1118	1126	1134	1142	1150	1158	1166	1174	1182	1190	1198	1206	1214	1222	1230	1238	1246	1254	1262	1270	1278	1286	1294	1302	1310	1318	1326	1334	1342	1350	1358	1366	1374	1382	1390	1398	1406	1414	1422	1430	1438	1446	1454	1462	1470	1478	1486	1494	1502	1510	1518	1526	1534	1542	1550	1558	1566	1574	1582	1590	1598	1606	1614	1622	1630	1638	1646	1654	1662	1670	1678	1686	1694	1702	1710	1718	1726	1734	1742	1750	1758	1766	1774	1782	1790	1798	1806	1814	1822	1830	1838	1846	1854	1862	1870	1878	1886	1894	1902	1910	1918	1926	1934	1942	1950	1958	1966	1974	1982	1990	1998	2006	2014	2022	2030	2038	2046	2054	2062	2070	2078	2086	2094	2102	2110	2118	2126	2134	2142	2150	2158	2166	2174	2182	2190	2198	2206	2214	2222	2230	2238	2246	2254	2262	2270	2278	2286	2294	2302	2310	2318	2326	2334	2342	2350	2358	2366	2374	2382	2390	2398	2406	2414	2422	2430	2438	2446	2454	2462	2470	2478	2486	2494	2502	2510	2518	2526	2534	2542	2550	2558	2566	2574	2582	2590	2598	2606	2614	2622	2630	2638	2646	2654	2662	2670	2678	2686	2694	2702	2710	2718	2726	2734	2742	2750	2758	2766	2774	2782	2790	2798	2806	2814	2822	2830	2838	2846	2854	2862	2870	2878	2886	2894	2902	2910	2918	2926	2934	2942	2950	2958	2966	2974	2982	2990	2998	3006	3014	3022	3030	3038	3046	3054	3062	3070	3078	3086	3094	3102	3110	3118	3126	3134	3142	3150	3158	3166	3174	3182	3190	3198	3206	3214	3222	3230	3238	3246	3254	3262	3270	3278	3286	3294	3302	3310	3318	3326	3334	3342	3350	3358	3366	3374	3382	3390	3398	3406	3414	3422	3430	3438	3446	3454	3462	3470	3478	3486	3494	3502	3510	3518	3526	3534	3542	3550	3558	3566	3574	3582	3590	3598	3606	3614	3622	3630	3638	3646	3654	3662	3670	3678	3686	3694	3702	3710	3718	3726	3734	3742	3750	3758	3766	3774	3782	3790	3798	3806	3814	3822	3830	3838	3846	3854	3862	3870	3878	3886	3894	3902	3910	3918	3926	3934	3942	3950	3958	3966	3974	3982	3990	3998	4006	4014	4022	4030	4038	4046	4054	4062	4070	4078	4086	4094	4102	4110	4118	4126	4134	4142	4150	4158	4166	4174	4182	4190	4198	4206	4214	4222	4230	4238	4246	4254	4262	4270	4278	4286	4294	4302	4310	4318	4326	4334	4342	4350	4358	4366	4374	4382	4390	4398	4406	4414	4422	4430	4438	4446	4454	4462	4470	4478	4486	4494	4502	4510	4518	4526	4534	4542	4550	4558	4566	4574	4582	4590	4598	4606	4614	4622	4630	4638	4646	4654	4662	4670	4678	4686	4694	4702	4710	4718	4726	4734	4742	4750	4758	4766	4774	4782	4790	4798	4806	4814	4822	4830	4838	4846	4854	4862	4870	4878	4886	4894	4902	4910	4918	4926	4934	4942	4950	4958	4966	4974	4982	4990	4998	5006	5014	5022	5030	5038	5046	5054	5062	5070	5078	5086	5094	5102	5110	5118	5126	5134	5142	5150	5158	5166	5174	5182	5190	5198	5206	5214	5222	5230	5238	5246	5254	5262	5270	5278	5286	5294	5302	5310	5318	5326	5334	5342	5350	5358	5366	5374	5382	5390	5398	5406	5414	5422	5430	5438	5446	5454	5462	5470	5478	5486	5494	5502	5510	5518	5526	5534	5542	5550	5558	5566	5574	5582	5590	5598	5606	5614	5622	5630	5638	5646	5654	5662	5670	5678	5686	5694	5702	5710	5718	5726	5734	5742	5750	5758	5766	5774	5782	5790	5798	5806	5814	5822	5830	5838	5846	5854	5862	5870	5878	5886	5894	5902	5910	5918	5926	5934	5942	5950	5958	5966	5974	5982	5990	5998	6006	6014	6022	6030	6038	6046	6054	6062	6070	6078	6086	6094	6102	6110	6118	6126	6134	6142	6150	6158	6166	6174	6182	6190	6198	6206	6214	6222	6230	6238	6246	6254	6262	6270	6278	6286	6294	6302	6310	6318	6326	6334	6342	6350	6358	6366	6374	6382	6390	6398	6406	6414	6422	6430	6438	6446	6454	6462	6470	6478	6486	6494	6502	6510	6518	6526	6534	6542	6550	6558	6566	6574	6582	6590	6598	6606	6614	6622	6630	6638	6646	6654	6662	6670	6678	6686	6694	6702	6710	6718	6726	6734	6742	6750	6758	6766	6774	6782	6790	6798	6806	6814	6822	6830	6838	6846	6854	6862	6870	6878	6886	6894	6902	6910	6918	6926	6934	6942	6950	6958	6966	6974	6982	6990	6998	7006	7014	7022	7030	7038	7046	7054	7062	7070	7078	7086	7094	7102	7110	7118	7126	7134	7142	7150	7158	7166	7174	7182	7190	7198	7206	7214	7222	7230	7238	7246	7254	7262	7270	7278	7286	7294	7302	7310	7318	7326	7334	7342	7350	7358	7366	7374	7382	7390	7398	7406	7414	7422	7430	7438	7446	7454	7462	7470	7478	7486	7494	7502	7510	7518	7526	7534	7542	7550	7558	7566	7574	7582	7590	7598	7606	7614	7622	7630	7638	7646	7654	7662	7670	7678	7686	7694	7702	7710	7718	7726	7734	7742	7750	7758	7766	7774	7782	7790	7798	7806	7814	7822	7830	7838	7846	7854	7862	7870	7878	7886	7894	7902	7910	7918	7926	7934	7942	7950	7958	7966	7974	7982	7990	7998	8006	8014	8022	8030	8038	8046	8054	8062	8070	8078	8086	8094	8102	8110	8118	8126	8134	8142	8150	8158	8166	8174	8182	8190	8198	8206	8214	8222	8230	8238	8246	8254	8262	8270	8278	8286	8294	8302	8310	8318	8326	8334	8342	8350	8358	8366	8374	8382	8390	8398	8406	8414	8422	8430	8438	8446	8454	8462	8470	8478	8486	8494	8502	8510	8518	8526	8534	8542	8550	8558	8566	8574	8582	8590	8598	8606	8614	8622	8630	8638	8646	8654	8662	8670	8678	8686	8694	8702	8710	8718	8726	8734	8742	8750	8758	8766	8774	8782	8790	8798	8806	8814	8822	8830	8838	8846	8854	8862	8870	8878	8886	8894	8902	8910	8918	8926	8934	8942	8950	8958	8966	8974	8982	8990	8998	9006	9014	9022	9030	9038	9046	9054	9062	9070	9078	9086	9094	9102	9110	9118	9126	9134	9142	9150	9158	9166	9174	9182	9190	9198	9206	9214	9222	9230	9238	9246	9254	9262	9270	9278	9286	9294	9302	9310	9318	9326	9334	9342	9350	9358	9366	9374	9382	9390	9398	9406	9414	9422	9430	9438	9446	9454	9462	9470	9478	9486	9494	9502	9510	9518	9526	9534	9542	9550	9558	9566	9574	9582	9590	9598	9606	9614	9622	9630	9638	9646	9654	9662	9670	



SETTLEMENT OPTIONS

AVAILABILITY. The person having control of this policy may, by written request to the Company at its Home Office, and with the written consent of the assignees, if any, elect to have the proceeds of this policy paid either in cash or in accordance with one of the following options. The beneficiary, after the Insured's death, if no previous election is then in force, may in like manner elect one of the following options as the mode of settlement.

OPTION ONE—Installment Payments for a Fixed Period. To have the sum payable, together with interest on the unpaid balance at the effective rate of two and one-half per cent per annum, paid in equal, consecutive, periodic installments for a selected fixed period of years in accordance with Table A.

OPTION TWO—Life Income with Payments Guaranteed for a Fixed Period. To have the sum payable paid in equal, consecutive, periodic installments for a fixed period of years and so long thereafter as the payee shall live, in accordance with Table B, C, or D.

OPTION THREE—Installment Payments for a Fixed Amount. To have the sum payable, together with interest on the unpaid balance at the effective rate of two and one-half per cent per annum, paid until exhaustion in consecutive periodic installments of a selected fixed amount. The fixed installment shall be the balance of the proceeds and interest.

OPTION FOUR—Proceeds Left at Interest. To have the Company retain the sum payable and pay interest thereon at the rate per \$1,000 of \$1.06 monthly, \$4.06 quarterly, \$9.86 semi-annually, or \$20.00 annually; provided that this option shall be available only for the payment of death or maturity claims. If specified in the election, withdrawals of \$100.00 or more from the sum retained may be made on interest due dates. If the balance held under this option at any time is less than \$1,000, such balance may be paid forthwith.

GENERAL PROVISIONS. Unless otherwise stipulated at election and concurred in by the Company, the first installment under Option One, Two or Three shall be payable as of the date of death, maturity, or election of cash value; and the first payment under Option Four shall be payable one interest period after death or maturity.

The effective interest rate of two and one-half per cent per annum shall be deemed to be the rate of 3.00% monthly, .618% quarterly, or 1.242% semi-annually in computing installments for each interval.

The Company reserves the right to make payments quarterly, semi-annually, or annually, or to reduce the number of years during which payments shall continue, or both, if necessary in order to avoid making periodic payments of less than \$10.00.

If a settlement option has been elected by any other than the payee, such payee shall not have the right to assign, encumber, alienate, or commute any payment thereunder, unless such right is given in the election; nor, to the extent permitted by law, shall the payments be subject to attachment, judicial process, or the claims of creditors of such payee. In no case may a payee commute the installments under Option Two.

In case of death of a payee under any of the options, unless there are provisions to the contrary, the committed value as of the date of death of any unpaid fixed period installments under Option One or Two on the basis of interest at the rate of two and one-half per cent per annum compounded annually, and any balance held by the Company under Option Three or Four with accrued interest to date of death shall be paid in one sum to the executors or administrators of the payee.

Each installment payment after the first under Option One, Two or Three and each interest payment under Option Four will be increased by such share of interest in excess of the rates guaranteed in these options as may be apportioned thereto by the Company.

OPTION ONE, TABLE A—EQUAL INSTALLMENTS FOR EACH \$1,000 OF THE NET SUM PAYABLE

Age in Years	No. of Years	Monthly Payment		No. of Years	Monthly Payment	
		Fixed Period 10 Years	Fixed Period 15 Years		Fixed Period 10 Years	Fixed Period 15 Years
1	9	\$44.28	\$10.32	17	\$4.00	
2	10	42.65	9.39	18	5.73	
3	11	38.79	8.66	19	6.49	
4	12	21.90	8.02	20	5.27	
5	13	17.79	7.49	21	6.26	
6	14	14.98	7.08	22	4.99	
7	15	12.95	6.64	23	4.74	
8	16	11.47	6.30	24	4.00	

Multiply the monthly payment by 2,904 to obtain the quarterly payment, by 8,900 to obtain the semi-annual payment, and by 11,865 to obtain the annual payment.

OPTION TWO—INCOME FOR FIXED PERIOD AND LIFE THEREAFTER
Equal Installments for Each \$1,000 of the Net Sum Payable

Age in Years	MONTHLY INCOME				Age in Years	MONTHLY INCOME			
	TABLE A Fixed Period 10 Years	TABLE B Fixed Period 15 Years	TABLE C Fixed Period 20 Years	TABLE D Fixed Period 25 Years		TABLE A Fixed Period 10 Years	TABLE B Fixed Period 15 Years	TABLE C Fixed Period 20 Years	TABLE D Fixed Period 25 Years
6	\$2.64	\$2.64	\$2.63	\$2.59	66	\$4.12	\$4.04	\$4.03	\$4.03
7	2.66	2.65	2.65	2.62	67	4.13	4.05	4.04	4.04
8	2.67	2.67	2.66	2.63	68	4.13	4.06	4.05	4.05
9	2.68	2.68	2.68	2.65	69	4.13	4.07	4.06	4.06
10	2.71	2.70	2.70	2.67	70	4.13	4.07	4.06	4.06
11	2.73	2.72	2.71	2.68	71	4.13	4.08	4.07	4.07
12	2.74	2.74	2.73	2.70	72	4.13	4.08	4.07	4.07
13	2.76	2.75	2.75	2.72	73	4.13	4.09	4.08	4.08
14	2.78	2.78	2.77	2.74	74	4.13	4.09	4.08	4.08
15	2.80	2.80	2.79	2.76	75	4.13	4.09	4.08	4.08
16	2.82	2.82	2.81	2.78	76	4.13	4.09	4.08	4.08
17	2.85	2.84	2.84	2.81	77	4.13	4.09	4.08	4.08
18	2.86	2.87	2.86	2.83	78	4.13	4.09	4.08	4.08
19	2.88	2.89	2.88	2.85	79	4.13	4.09	4.08	4.08
20	2.90	2.89	2.89	2.86	80	4.13	4.09	4.08	4.08
21	2.92	2.92	2.91	2.88	81	4.13	4.09	4.08	4.08
22	2.95	2.95	2.94	2.91	82	4.13	4.09	4.08	4.08
23	2.97	2.97	2.96	2.93	83	4.13	4.09	4.08	4.08
24	2.99	2.99	2.98	2.95	84	4.13	4.09	4.08	4.08
25	3.01	3.01	3.00	2.97	85	4.13	4.09	4.08	4.08
26	3.04	3.04	3.03	3.00	86	4.13	4.09	4.08	4.08
27	3.06	3.06	3.05	3.02	87	4.13	4.09	4.08	4.08
28	3.08	3.08	3.07	3.04	88	4.13	4.09	4.08	4.08
29	3.11	3.10	3.09	3.06	89	4.13	4.09	4.08	4.08
30	3.14	3.13	3.11	3.08	90	4.13	4.09	4.08	4.08
31	3.16	3.15	3.14	3.10	91	4.13	4.09	4.08	4.08
32	3.18	3.17	3.16	3.12	92	4.13	4.09	4.08	4.08
33	3.21	3.20	3.19	3.14	93	4.13	4.09	4.08	4.08
34	3.23	3.22	3.21	3.16	94	4.13	4.09	4.08	4.08
35	3.25	3.24	3.23	3.18	95	4.13	4.09	4.08	4.08

Age 85 if years given for male or female is the age at last birthday of the payee when payments begin. Age "80" and "85" each following an asterisk (*) include all ages above 80 and 85 years respectively.

Multiply the monthly payment by 2,904 to obtain the quarterly payment, by 8,904 to obtain the semi-annual payment, and by 11,765 to obtain the annual payment.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Rollin E. Bowles; Weiser, Bowles & Young, plaintiff's attorneys, whose address is 706 Weatherly Building, Portland 14, Oregon, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: September 29, 1958.

[Seal] R. DeMOTT,
Clerk,

By /s/ M. CASEY,
Deputy Clerk.

Return on service of writ attached.

[Endorsed]: Filed October 3, 1958.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for an answer to the plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits allegations contained in Paragraphs I and II of plaintiff's Complaint.

II.

Denies generally each and every other allegation, statement and thing contained in plaintiff's Complaint.

Wherefore, having fully answered plaintiff's Complaint demands judgment that plaintiff take nothing by reason thereof and that this case be dismissed.

/s/ DONALD A. BUSS,
Of Attorneys for Defendant;

/s/ HOLLIE PIHL,
Of Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The following Pre-Trial Order was regularly heard and formulated at pre-trial proceedings, before the undersigned Judge. Plaintiff appearing by Rollin E. Bowles, his attorney, and Defendant appearing by Buss & Pihl, Donald A. Buss and Hollie Pihl, its attorneys.

Nature of Cause

This is a civil action for the recovery of money.

Agreed Facts

The parties hereto agree upon the following facts, and no proof shall be necessary as to the same at the time of trial:

1. That the Plaintiff is a citizen of the State of Oregon.

2. That the Defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is qualified to do business in the State of Oregon.

3. That the matter in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00.

4. That the Court has jurisdiction over the parties and the subject matter.

5. That Walter A. Reklau at all times herein pertinent was the general agent of the Defendant insurance company; and that Osborne Myers, Jr., and Leo H. Ragnile were agents and employees of the said company, working under the supervision of the general agent, Walter A. Reklau.

6. That the Defendant issued to the Plaintiff a policy of insurance and that the Plaintiff has paid a total of \$3,000.00 in premiums thereon since its issuance.

7. That the Defendant company paid to the Plaintiff the sum of \$100.00 as a dividend on January 20, 1958, under the insurance policy herein mentioned.

Plaintiff's Contentions

Plaintiff contends:

1. That the Defendant insurance company acting by and through its general agent, Walter A. Reklau,

and sales agents, Osborne Myers, Jr., and Leo H. Ragnile, fraudulently, willfully and deliberately misrepresented the nature of said policy of insurance to the Plaintiff.

2. That said representations on the part of the agents of the Defendant company were false and were material to the Plaintiff and that the agents knew that the said representations were false and intended that the Plaintiff should act upon the representations and purchase said policy. That the Plaintiff was ignorant of the falsity of said representations and relied upon their truth and had a right to rely thereon.

3. That the Defendant company knew, or in the exercise of reasonable diligence, should have known, of the false and fraudulent misrepresentations made by their said agents in the sale of said insurance policy; and Plaintiff has been damaged in the amount of \$3,000.00, with interest at the rate of six per cent per annum on \$1,000.00 from January 20, 1956, until paid, with interest at the rate of six per cent per annum on \$1,000.00 from January 20, 1957, until paid, and with interest on \$1,000.00 from January 20, 1958, until paid.

4. That the representations aforesaid on the part of the agents of the Defendant company were willful, deliberate and malicious, and Plaintiff is entitled to punitive damages in the amount of \$10,000.00.

Defendant's Contentions

Defendant contends:

5. The Defendant denies the contentions made by the Plaintiff.

Plaintiff's Exhibits

1. Insurance policy hereinabove referred to.
2. Deposition of Leo H. Ragnile.
3. Deposition of Osborne Myers, Jr.

Defendant's Exhibits

15. Deposition of Virgil N. Lee, Plaintiff.

Issues

1. Did the Defendant by and through its agents, make the representations as contended by the Plaintiff?

2. Were the representations, if any, fraudulently, wilfully, and deliberately made to Plaintiff?

3. Were the representations, if any, material representations?

4. Were the representations, if any, made with the knowledge that such representations, if any, were false or that they were made recklessly and with a disregard as to their truth or falsity?

5. Were the representations, if any, made for the purpose of deceiving the Plaintiff and for the purpose of inducing the Plaintiff to act upon them?

6. Was the Plaintiff ignorant of the falsity, if any, of the representations, if any?

7. Did the Plaintiff actually rely on the repre-

sentations, if any, and if the Plaintiff did so rely, was the Plaintiff entitled to rely on such representations, if any?

8. Did the Plaintiff suffer any damages as a direct result of the representations, if any?

9. Is the Plaintiff entitled to punitive damages under all the facts and circumstances in this case?

10. If the Plaintiff is entitled to recover, what are his general damages?

11. If the Plaintiff is entitled to recover, what are his punitive damages?

Now Therefore, it is hereby

Ordered, that the foregoing Pre-Trial Order having been agreed upon between the Court and counsel, shall supersede the pleadings, which are hereby amended to conform hereto. This order shall control the subsequent course of proceedings herein and shall not be amended at the trial except by consent or to prevent manifest injustice.

Entered at Portland, Oregon, this 12th day of April, 1959.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ROLLIN E. BOWLES,
Of Attorneys for Plaintiff,

/s/ HOLLIS PIHL,
Attorney for Defendant.

Lodged: February 16, 1959.

[Endorsed]: Filed April 12, 1959.

[Title of District Court and Cause.]

AMENDED PRE-TRIAL ORDER

The following Pre-Trial Order was regularly heard and formulated at pre-trial proceedings, before the undersigned Judge, Plaintiff appearing by Rollin E. Bowles, his attorney, and Defendant appearing by Buss & Pihl, Donald A. Buss and Hollie Pihl, its attorneys.

Nature of Cause

This is a civil action for the recovery of money.

Agreed Facts

The parties hereto agree upon the following facts, and no proof shall be necessary as to the same at the time of trial:

1. That the Plaintiff is a citizen of the State of Oregon.
2. That the Defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is qualified to do business in the State of Oregon.
3. That the matter in controversy, exclusive of interest and costs, exceeds the amount of \$10,000.00.
4. That the Court has jurisdiction over the parties and the subject matter.
5. That Walter A. Reklau at all times herein pertinent was the general agent of the Defendant

insurance company; and that Osborne Myers, Jr., and Leo H. Rognlie were agents and employees of the said company, working under the supervision of the general agent, Walter A. Reklau.

6. That the Defendant issued to the Plaintiff a policy of insurance and that the Plaintiff has paid a total of \$3,000.00 in premiums thereon since its issuance.

7. That the Defendant company paid to the Plaintiff the sum of \$100.00 as a dividend on January 20, 1958, under the insurance policy herein mentioned.

Plaintiff's Contentions

Plaintiff contends:

1. That the Defendant insurance company acting by and through its general agent, Walter A. Reklau, and sales agents, Osborne Myers, Jr., and Leo H. Rognlie, fraudulently, willfully and deliberately misrepresented the nature of said policy of insurance to the Plaintiff.

2. That said representations on the part of the agents of the Defendant company were false and were material to the Plaintiff and that the agents knew that the said representations were false and intended that the Plaintiff should act upon the representations and purchase said policy. That the Plaintiff was ignorant of the falsity of said representations and relied upon their truth and had a right to rely thereon.

3. That the Defendant company knew, or in the exercise of reasonable diligence, should have known, of the false and fraudulent misrepresentations made by their said agents in the sale of said insurance policy; and Plaintiff has been damaged in the amount of \$3,000.00, with interest at the rate of six per cent per annum on \$1,000.00 from January 20, 1956, until paid, with interest at the rate of six per cent per annum on \$1,000.00 from January 20, 1957, until paid, and with interest on \$1,000.00 from January 20, 1958, until paid.

4. That the representations aforesaid on the part of the agents of the Defendant company were willful, deliberate and malicious, and Plaintiff is entitled to punitive damages in the amount of \$10,000.00.

Defendant's Contentions

Defendant contends:

5. The Defendant denies the contentions made by the Plaintiff.

6. That the Plaintiff, since his alleged discovery of the alleged fraud or misrepresentations, has by his course of conduct affirmed his insurance contract with Defendant and cannot now elect to rescind the insurance contract.

7. That the Plaintiff has not attempted to make restitution to Defendant by tendering up to Defendant the \$100.00 dividend received and the insurance policy on his life, and therefore Plaintiff is not entitled to rescission of the insurance contract.

8. That the Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresentations, has waived any alleged fraud or misrepresentations of Defendant's agents in the sale of the insurance policy to Plaintiff, and therefore Plaintiff is not entitled to rescission of the insurance contract.

9. That the Plaintiff has failed to act promptly in rescinding the insurance contract upon his alleged discovery of the alleged misrepresentations of Defendant's agents and is not now entitled to rescind the contract.

Plaintiff denies Defendant's contentions.

Plaintiff's Exhibits

1. Insurance policy hereinabove referred to.
2. Deposition of Leo H. Rognlie.
3. Deposition of Osborne Myers, Jr.

Defendant's Exhibits

15. Deposition of Virgil N. Lee, Plaintiff.
16. Letter of Rollin Bowles to Equitable Life and Casualty Insurance Company dated January 19, 1959.
17. Letter from Lewis R. Rich to Virgil N. Lee dated January 20, 1958.

Issues

1. Did the Defendant by and through its agents, make the representations as contended by the Plaintiff?

2. Were the representations, if any, fraudulently, willfully, and deliberately made to Plaintiff?

3. Were the representations, if any, material representations?

4. Were the representations, if any, made with the knowledge that such representations, if any, were false or that they were made recklessly and with a disregard as to their truth or falsity.

5. Were the representations, if any, relied upon made for the purpose of deceiving the Plaintiff and for the purpose of inducing the Plaintiff to act upon them?

6. Was the Plaintiff ignorant of the falsity, if any, of the representations, if any?

7. Did the Plaintiff actually rely on the representations, if any, and if the Plaintiff did so rely, was the Plaintiff entitled to rely on such representations, if any?

8. Did the Plaintiff suffer any damages as a direct result of the representations, if any?

9. Is the Plaintiff entitled to punitive damages under all the facts and circumstances in this case?

10. If the Plaintiff is entitled to recover, what are his general damages?

11. If the Plaintiff is entitled to recover, what are his punitive damages?

12. Has the Plaintiff, since his alleged discovery of the alleged fraud or misrepresentations, by his course of conduct affirmed his insurance contract

with Defendant, and if so, is he entitled to now rescind the contract?

13. Has the Plaintiff failed to make restitution to Defendant by tendering up to Defendant the \$100.00 dividend received and the insurance policy on his life, and if so, is he entitled to now rescind the insurance contract?

14. Has the Plaintiff, by his course of conduct since his alleged discovery of the alleged fraud or misrepresentations, waived any alleged fraud or misrepresentations of Defendant's agents in the sale of the insurance policy to Plaintiff, and if so, is Plaintiff entitled to now rescind the insurance contract?

15. Has Plaintiff failed to act promptly in rescinding the insurance contract upon his alleged discovery of the alleged misrepresentations of Defendant's agents, and if so, is Plaintiff now entitled to rescind the contract?

Now, Therefore, it is hereby

Ordered, that the foregoing Pre-Trial Order having been agreed upon between Court and counsel, shall supersede the pleadings, which are hereby amended to conform hereto. This order shall control the subsequent course of proceedings herein and shall not be amended at the trial except by consent or to prevent manifest injustice.

Entered at Portland, Oregon, this 13th day of April, 1959.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ROLLIN E. BOWLES,
Of Attorneys for Plaintiff;

/s/ HOLLIE PIHL,
Of Attorneys for Defendant.

[Endorsed]: Filed April 13, 1959.

[Title of District Court and Cause.]

OPINION

Sept. 23, 1959

Solomon, Judge:

Dr. Virgil Lee, the plaintiff, brought this action in fraud against Equitable Life and Casualty Insurance Company to recover damages occasioned by defendant's misrepresentations.

In January, 1956, plaintiff purchased a twenty-payment life insurance policy from defendant, upon which three annual premiums of \$1,000 each had been paid prior to the commencement of this action. At the conclusion of trial, I found that the purchase of this policy had been induced by defendant's fraud in falsely representing that dividends on this type of policy had in the past averaged approximately 20 per cent per annum on the total premiums paid. In October, 1957, defendant informed plaintiff that it intended to pay a 10 per cent dividend on the annual premium only. In January, 1958, it paid plaintiff a dividend of \$100.

This matter is now before the court on defendant's claim that plaintiff waived his right to rescind the contract by retaining the dividend and by failing to give timely notice of his intention to rescind. Defendant asserts that plaintiff is therefore precluded from maintaining this action.

Defendant misconstrues plaintiff's complaint. This is an action for damages, not rescission. Plaintiff affirmed the contract and waived his right to rescind. By this affirmance, he did not waive his right to recover damages. *Selman vs. Shirley*, 1938, 161 Or. 582, 85 P.2d 384; *Sheppard vs. Blitz*, 1945, 177 Or. 501, 163 P.2d 519.

The question left to be determined is the proper measure of damages. Counsel are invited to submit briefs on whether the "out of pocket rule" or the "benefit of the bargain rule" is properly applicable to the present action.

Plaintiff shall have 10 days to submit authorities and defendant shall have an equal time thereafter to answer.

[Endorsed]: Filed September 23, 1959.

[Title of District Court and Cause.]

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter came on regularly for trial before the Honorable Gus J. Solomon, Judge of the above-

entitled Court; plaintiff appearing in person and by Rollin E. Bowles, of Weiser, Bowles & Young, and defendant appearing by Hollie Pihl and H. Kent Holman of Buss & Pihl. A pre-trial order approved by the parties was signed by the Court and entered.

The Court heard the evidence, found in favor of plaintiff, and in accordance therewith makes the following

Findings of Fact

I.

Plaintiff is a resident and citizen of the State of Oregon, and the defendant is a corporation existing under the laws of the State of Utah.

II.

The matter in controversy exceeds the sum of \$10,000.00.

III.

At all pertinent times, O. R. Myers, Jr., and Leo H. Rognile were salesmen employed by the defendant, and Walter A. Reklau was the general agent of the defendant in the area of Multnomah County, Oregon.

IV.

On or about January 20, 1956, the defendant through Myers, Rognile and Reklau, to induce plaintiff to purchase an insurance policy, falsely represented that the policy was an investment which would pay dividends at the rate of twenty per cent per year, beginning at the end of the second year of the policy; the first dividend to be paid on the third

anniversary of the issuance of the policy, and dividends equal to twenty per cent of the accumulated premiums would thereafter be paid each year. They further represented that the company had paid these returns in prior years and that other companies with similar programs have paid returns equally as great if not greater.

V.

The representations made by the salesmen and general agent were material, false, and known by them to be false, and were made knowingly and willfully. In making such representations the salesmen and general agent acted as agents of the company and within the scope of their employment.

VI.

Relying upon these representations, plaintiff did purchase a twenty payment life participating policy, Number 110320, with a face insurance value of \$16,033.00 and with annual premiums of \$1,000.00.

VII.

Plaintiff made an immediate payment of \$1,000.00 and subsequently paid two additional annual premiums of \$1,000.00 each.

VIII.

In October, 1957, Mr. Ross, assistant to the general manager of the defendant company, informed plaintiff that the defendant did not intend to pay dividends in accordance with the representations of its agents. The plaintiff then learned for the first

time that the representations of the salesmen and the general manager had been false.

IX.

In January, 1958, and in January, 1959, the defendant paid dividends of \$100.00, which dividends were equal to ten per cent of the annual premium.

X.

Within two years from the discovery of the fraud, plaintiff affirmed the contract and filed this action for damages.

XI.

Plaintiff suffered general damages in the sum of \$3,000.00 and, by reason of the wilfulness of the misrepresentations, plaintiff is entitled to punitive damages in the sum of \$2,000.00.

Conclusions of Law

I.

This Court has jurisdiction of this cause.

II.

Plaintiff's action for damages, based upon his affirmance of the contract, was timely brought.

III.

Plaintiff is entitled to the sum of \$3,000.00 as general damages, the further sum of \$2,000.00 as punitive damages, and for plaintiff's costs and disbursements.

Dated this 11th day of May, 1960.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 12, 1960.

In the United States District Court
for the District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE COMPANY,

Defendant.

JUDGMENT ORDER

Based upon Findings of Fact and Conclusions of Law heretofore entered,

It is Ordered and Adjudged that plaintiff recover from the defendant the sum of \$3,000.00 as general damages, together with \$2,000.00 as punitive damages, and for costs and disbursements taxed at \$45.10.

Dated this 11th day of May, 1960.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 12, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Plaintiff, Virgil N. Lee, and Rollin Bowles,
Weiser and Bowles, his attorneys.

Notice is hereby given that the Defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from final judgment entered in this action in favor of the Plaintiff and against the Defendant, which judgment is dated May 11, 1960, and was entered May 12, 1960.

Dated this 8th day of June, 1960, at Portland, Oregon.

/s/ H. KENT HOLMAN,
Of Attorneys for Defendant, Buss & Pihl, H. Kent
Holman.

Service of copy acknowledged.

[Endorsed]: Filed June 8, 1960.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, that we, Equitable Life and Casualty Insurance Company, a corporation, Principal, and United States Fidelity and Guaranty Company, a Maryland corporation, duly licensed to do a surety company business in

the State of Oregon, Surety, are held and firmly bound unto Virgil N. Lee in the sum of \$6,000.00 to be paid to the said Virgil N. Lee, his attorneys, successors, executors, administrators and assigns, to which payment to be well and truly paid, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June, 1960.

Whereas, on May 11, 1960, a Judgment was rendered in the above-entitled action in favor of the above-named obligee, and the said Equitable Life and Casualty Insurance Company has duly filed a Notice of Appeal from said Judgment to the United States Court of Appeals for the Ninth Circuit; and

Whereas, the said Equitable Life and Casualty Insurance Company desires a stay of all proceedings in the above-entitled cause until determination of said appeal;

Now, therefore, the condition of this bond is such that if the said Equitable Life and Casualty Insurance Company, as appellant, shall prosecute its appeal with effect and shall satisfy the said Judgment in full together with costs, interest and damages for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the Judgment and costs, interest and damages as may be adjudged and awarded by

the said Court of Appeals, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] **EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,**

By /s/ **LEWIS R. RICH,**
Secretary;

[Seal] **THE UNITED STATES FIDELITY AND GUARANTY COMPANY,**

By /s/ **JOHN L. RIESCHEL,**
Attorney-in-Fact.

Countersigned at Portland, Oregon, this 10th day of June, 1960.

By /s/ **EDWARD C. STIPE,**
Resident Agent.

The amount of the foregoing bond is hereby approved at Portland, Oregon, this 13th day of June, 1960.

/s/ **ROLLIN E. BOWLES,**
Of Attorneys for Appellee.

The foregoing bond is hereby approved this 13th day of June, 1960, to stand as a supersedeas until the final determination of the appeal.

/s/ **WILLIAM G. EAST,**
United States District Judge.

' Service of copy acknowledged.

' [Endorsed]: Filed June 13, 1960.

[Title of District Court and Cause.]

STATEMENTS OF POINTS
TO BE RELIED UPON

(1) This action brought by the Plaintiff is a rescission action for the recovery of premiums paid on a life insurance policy, all as evidenced by the Pleadings, Pre-trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain punitive damages in addition to a rescission of the insurance contract. The amount in controversy under the rescission action is \$3,000.00, therefore the federal courts lack jurisdiction in this case because the amount in controversy is less than \$10,000.00.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the pleadings are complete, Pre-trial Order has been entered and trial of the case has been had.

(3) The Findings of Fact and Conclusions of Law are not supported by the evidence.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct affirmed his insurance contract with De-

fendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to Defendant by tendering up to Defendant the \$100.00 dividend received and the insurance policy on his life, and therefore Plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresentation, has waived any fraud or misrepresentation of Defendant's salesmen in the sale of the insurance policy to Plaintiff, and therefore Plaintiff not now entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of Defendant's salesmen and is no longer entitled to rescind the contract.

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with Defendant.

/s/ H. KENT HOLMAN,
Of Attorneys for Defendant; Donald A. Buss, Hollie
Pihl, H. Kent Holman and Arthur Nielson,
Buss & Pihl.

Affidavit of service by mail attached.

[Endorsed]: Filed July 7, 1960.

[Title of District Court and Cause.]

ORDER

Defendant-Appellant having moved by its attorneys to forward all of the exhibits in the above-entitled case;

It Is Hereby Ordered that all of the exhibits in the above-entitled case be forwarded to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated this 8th day of July, 1960.

/s/ JOHN F. KILKENNY,
Judge

[Endorsed]: Filed July 8, 1960.

[Title of District Court and Cause.]

ORDER

Based upon the Motion presented by one of Defendant's attorneys, H. Kent Holman, for 15 days' extension of time,

It Is Hereby Ordered that the Defendant shall have 15 days from this date in order to perfect its Appeal in the above-entitled case.

Dated this 12th day of July, 1960.

/s/ JOHN F. KILKENNY,
Judge.

[Endorsed]: Filed July 12, 1960.

United States District Court
District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE COMPANY,

Defendant.

Before: Honorable Gus J. Solomon,
District Judge.

TRANSCRIPT OF PROCEEDINGS

April 13, 1959—1:30 P.M.

Appearances:

MR. ROLLIN E. BOWLES,
Of Attorneys for Plaintiff.

MESSRS. HOLLIE PIHL and
KENT HOLMAN,
Of Attorneys for Defendant.

The Court: I have read the pretrial order and the amended pretrial order. Is there anything else you want to say, Mr. Bowles?

Mr. Bowles: Thank you, your Honor. I don't think there is anything else that I need to say at this juncture.

The Court: Do you want to say something, Mr. Pihl?

Mr. Pihl: No, your Honor.

The Court: Call your first witness.

VIRGIL N. LEE

the Plaintiff herein, was produced as a witness in his own behalf, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

The Court: I have read his deposition, which indicates that he is a dentist, and he lives at 822 Northeast Broadway and he has practiced dentistry in Oregon for about fifteen years; that he has his offices in the Weatherly Building, and that he is the plaintiff in this case. So you won't have to go into that.

Mr. Bowles: Very good, your Honor. [2*]

Q. Dr. Lee, were you ever contacted by a representative of the Equitable Life and Casualty Company with respect to their program of insurance? A. Yes, sir.

Q. Who was the first person that you recollect contacted you? A. Mr. Leo Rognlie.

Q. Approximately what time or what year?

A. I believe that was 1955 in the late summer.

Q. Was there more than one contact during that area of time? A. Yes, sir.

Q. Did anyone other than Mr. Rognlie ever contact you?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Virgil N. Lee.)

A. Would you repeat that, sir? I don't think I quite got it.

Q. Were there other persons than Mr. Rognlie who contacted you? A. Yes.

Q. Who were they?

A. Mr. O. R. Myers and Mr. Reklau.

Q. Will you tell us what the substance of their contacts was?

A. To begin with, a health and accident policy was proposed to me, brought to my attention, by Mr. Rognlie. I wasn't interested in health and accident insurance, being fully protected. Then the question was brought up of insurance profit-sharing in nature. That was discussed at considerable length.

The Court: Tell us what they said and what you said.

A. Sir? [3]

The Court: What did they say? What did Mr. Rognlie say about a profit-sharing contract?

A. That the company was issuing such a policy and that it had features in it of sharing in the profits of the company.

The Court: Was it an insurance policy?

A. There was an insurance policy associated with it, sir.

The Court: What size insurance policy was it?

A. \$16,000, 20-pay-life.

The Court: \$16,000, 20-pay-life?

A. Yes, sir.

(Testimony of Virgil N. Lee.)

The Court: You would pay \$1,000 a year?

A. Yes, sir.

The Court: And what would you get in addition to the \$16,000 in life insurance?

A. A share of the earnings of the company in all the states in which the company did business in excess of the regular dividends, and its earning capacity was much greater than that.

The Court: What do you mean, its earning capacity was much greater than that?

A. There were many ways in which an insurance company could earn money; that a policy properly handled, a profit-sharing policy, had five, I believe, different ways in which it would earn dividends over and above what an ordinary insurance policy might enjoy.

The Court: Did they tell you that you were going to get [4] profits that other policyholders were not going to get?

A. Yes, sir.

The Court: And you would have a 20-pay-life?

A. Yes, sir.

The Court: Were you told that other people who bought a 20-pay-life policy would not get as much as you would if they didn't pay that little additional amount?

A. Not unless it was a profit-sharing policy, sir.

The Court: A profit-sharing policy, in your opinion, was one in which you would get what?

A. The dividends were cumulative by \$1,000 per

(Testimony of Virgil N. Lee.)

year. This policy was one unit consisting of 16 shares.

The Court: 16 shares of what?

A. Each share coming into the annual working capital as the \$1,000 was paid to the extent of 16 shares.

The Court: Were you buying stock in the company?

A. As such, no, but as it was described to me, at the end of a certain number of years, preferably five years, there would undoubtedly be stock splits. This was explained to me.

The Court: Stock splits?

A. Yes, sir; and that we would then be as this book, *Hidden Ways to Wealth*, indicates what companies had done in previous times.

The Court: In stock companies, you mean?

A. Yes, sir. [5]

Mr. Bowles: If I might interrupt the Court, I would suggest that we have an exhibit at this point, this circular, *Hidden Ways to Wealth*.

Mr. Pihl: No objection, your Honor.

Mr. Bowles: It has been marked as Plaintiff's Exhibit 5.

The Court: Admitted.

(The pamphlet referred to, entitled "Hidden Ways to Wealth," was received in evidence as Plaintiff's Exhibit 5.)

The Court: Did they show you the policy of insurance when they were talking to you?

(Testimony of Virgil N. Lee.)

A. No, sir.

The Court: They just gave you that book?

A. This book was left with me primarily by Mr. Myers, one of the agents of the company. If I might explain to the Court, I wasn't interested in insurance, and I told them so. I didn't want insurance, but in order to enjoy—I wanted income. Through this, as explained in this book, *Hidden Ways to Wealth*, what other companies had done, we had the opportunity to invest in this and get all these dividends, which would bring our policy up to many times its original face value by the end of twenty years, and at the end of five to seven years it would be self-supporting.

The Court: You mean after five to seven years you would earn so much you wouldn't have to pay any more premiums? [6]

A. That is right, sir; no more premiums.

The Court: Before you go any further, let me find out from the defendant what your position is on this.

Mr. Pihl: Your Honor, our position is that all the statements made by the defendant's agents were in the matter of speculation as to future dividends passed.

The Court: What kind of a policy did he get?

Mr. Pihl: A 20 Payment Life, your Honor, with a \$16,074 face value.

The Court: Would he pay a thousand dollars a year for it?

Mr. Pihl: At his age he would pay a thousand

(Testimony of Virgil N. Lee.)

dollars a year for it, your Honor. I believe his age at that time was 52, if I am not mistaken.

The Court: If he paid a thousand dollars a year for 20 years he would get \$16,000 back?

Mr. Pihl: Yes, plus, your Honor, as the first paragraph of the policy sets forth, a 3 per cent on any dividends that were left in with the company.

The Court: Did they have a guaranteed dividend rate?

Mr. Pihl: Of 3 per cent, your Honor, a guarantee. As the policy states, the company will pay the face amount of insurance together with any dividends and interest thereon at not less than 3 per cent a year compounded annually. They did have a 3 per cent guarantee.

Mr. Bowles: I would like to submit Plaintiff's Exhibit [7] No. 1 here, which is the actual policy.

The Court: Do they provide for any stock?

Mr. Pihl: No, your Honor.

The Court: The only thing that the policy provides is for this 3 per cent dividend?

Mr. Pihl: 3 per cent interest, your Honor, compounded annually.

The Court: On dividends?

Mr. Pihl: On dividends, and interest.

The Court: It says, "Profit-Sharing.

"This policy shall participate in the profits of the company. Such profits shall be composed of (1) Savings in Mortality, (2) Profit From Lapses, (3) Interest in Excess of Reserve Requirements, and (4) Savings From Expense Loadings and in Econ-

(Testimony of Virgil N. Lee.)

omy of Management. Dividends are payable as provided in the paragraphs headed 'Dividends' on Page 2 hereof."

Mr. Bowles: The first main column.

The Court (Reading from Exhibit 1):

"Beginning at the end of the second policy year, this policy shall annually participate in the profits of the Company, as determined by the Board of Directors. Such participation shall continue while this policy is in full force on a premium-paying basis. Any dividends [8] from such profits apportioned by the Board of Directors on this policy shall at any time at the option of the Payor be either (1) paid in cash; or (2) applied to payment of premiums; or (3) applied to the purchase of non-participating paid-up insurance, without evidence of insurability, and payable at the same time and on the same conditions as this policy; or (4) left with the Company to accumulate at the rate of interest determined by the Board of Directors, but in no event less than three per cent compounded and credited annually. Such accumulations may be withdrawn in cash by the Payor on any policy anniversary or, if not withdrawn in cash, the dividend accumulations will be paid upon the maturity or expiry of the policy. If no option is selected, the dividends will be applied as provided under Option (3).

"Any apportionment, distribution of profits, or declaration of dividends shall be at the sole and exclusive discretion of the Board of Directors and

(Testimony of Virgil N. Lee.)

the methods and principles employed in the determination of such apportionment, distribution of profits, and declaration of dividends shall be conclusive upon all parties having or claiming any interest under this policy.”

Why was this “profit-sharing” statement in [9] block letters, blocked? Isn’t that the way every company pays dividends?

Mr. Pihl: On most policies, your Honor, 20 Pay Life do not pay any dividend, as such. They pay interest, and, as this policy sets forth, and it is my understanding that there were certain profit-sharing elements in the policy as set forth in this blocked-out area.

The Court: Perhaps we can shorten this. Do you agree that the statements were made that he talked about?

Mr. Pihl: No, your Honor.

The Court: This is a very expensive policy. One ought to get something if he pays this much premium. Proceed.

Q. (By Mr. Bowles): I will hand you now, Dr. Lee, what has been marked Plaintiff’s Exhibit 4 and ask you if that was among the sales items that were shown to you during the course of your discussions with Mr. Reklau, Mr. Rognlie, or Mr. Myers? A. I believe it was, sir, yes.

The Court: Let me see it.

(Exhibit presented to the Court.)

The Court: Is there any objection?

(Testimony of Virgil N. Lee.)

Mr. Pihl: No, your Honor.

The Court: It is admitted.

(Pamphlet, "You Have Been Nominated," previously marked Plaintiff's Exhibit 4 for Identification, was received in evidence.) [10]

Q. (By Mr. Bowles): Will you explain to the Court what was told to you by the agents of the Equitable Life and Casualty?

A. By what agent?

Q. Any of the three that you have mentioned, Mr. Reklau, Mr. Rognlie or Mr. Myers, the dividend schedule as on this policy that they proposed that you take out?

Mr. Pihl: Your Honor, I will object to the answering of that question until such time as plaintiff lays a proper foundation as to when and where these conversations were and who was present.

Mr. Bowles: Very well.

The Court: You can bring that out later yourself. This is not for the purpose of impeachment. Did Mr. Rognlie tell you about the dividends that you were going to get?

The Witness: No, sir; not in its entirety, but Mr. Rognlie explained something of the policy to me, and then Mr. Myers and Mr. Rognlie came in, and I was enlightened further as to this profit-sharing policy and its nature, and at that time, I think the second visit, this book, *Hidden Ways to Wealth*, was left with me for me to read over and see what the virtues of these companies were and

(Testimony of Virgil N. Lee.)

what their accomplishments had been. Mr. Myers gave me some explanation. Mr. Reklau was the one who gave me most of the rundown, the figures from a so-called pitch sheet, I believe they call them.

The Court: What did he tell you? [11]

The Witness: Well, that the gist of it was that within a specified number of years, approximately seven years, closer to five, that this policy's earnings would be such that it would be self-supporting, and I would no longer be required to pay the thousand dollar premium, and that in time it would multiply itself many times the face value of the policy due to the earnings and from the amount of business the company was doing.

The Court: Proceed.

Q. (By Mr. Bowles): When was the first dividend to be returnable to you?

A. At the end of the second year, as I recall.

Q. How was that dividend to be collected in respect to the premiums paid?

A. The dividend, from my figures obtained from the agents, were that it started at 8 per cent, but it turned out to be 10 per cent. That was the regular dividend. The 11.9 which represented my age group was in addition to this regular dividend, representing, as I understand, earnings of the company.

The Court: I do not know how we get the figure of 11.9.

The Witness: It was presented to me due to my age group.

(Testimony of Virgil N. Lee.)

The Court: When you are 52 years old, you get 11.9, almost a 12 per cent additional dividend?

The Witness: Yes, sir. That was from earnings that was, represented earnings the policy would earn through the business the company was doing, which returned a figure of 21.9 or \$219. [12]

Q. (By Mr. Bowles): Was that calculated on the first thousand dollars that you paid as a premium?

A. After the second, at the end, or beginning of the third year's premium, that accumulated dividend then would apply to the three years' premium, and that was the earnings represented to me by Mr. Reklau.

Q. Then with respect to future dividends these payments built up, how were those to be calculated?

A. As the increased business of the company progressed, it would be increased in earnings, and as Mr. Ray Ross, the General Sales Agent, I believe, the last visit with him, informed me, it might reach 46 per cent as a company in Oklahoma had done. He did not specify what company it was.

Q. Were these dividends to be paid only on the first premium that you paid, or were they to be accumulative? A. They were accumulative.

Q. And as each successive dividend became due, it would apply on one thousand first, two thousand, and so forth?

A. Successively, yes, to the point where the policy was self-sustaining and the profit could come to me or be left to earn with the company.

(Testimony of Virgil N. Lee.)

Q. Was your policy of insurance, which is Plaintiff's Exhibit 1, was that delivered to you by any of these agents, or was it sent to you through the mail? Do you recall?

A. I couldn't say for sure, but I believe it was handed to me, [13] I believe, by Mr. Myers, because his card is included in the little packet for that purpose there. I would not swear to that, sir. I don't remember too clearly.

Q. Was there any further discussion with respect to dividends at the time this policy was delivered?

A. Yes; I could anticipate very handsome dividends; the company was doing excellent business.

Q. How many of these conferences were held between you and either Mr. Reklau, Mr. Myers, Mr. Rognlie or any of the three together?

A. It would be quite difficult to ascertain a definite number because the men would drop in occasionally, or at times I called them to verify certain questions that I wanted to know the answers to in relation to this policy.

Q. How many times would you say?

A. Oh, probably altogether maybe ten visits.

Q. I will hand you now what has been marked Plaintiff's Exhibit 6. Did you ever see such a sheet as that?

A. Yes, sir.

Q. Where was that? Where did you see that sheet?

A. In my office.

Q. Who showed it to you?

A. Mr. Reklau.

(Testimony of Virgil N. Lee.)

Mr. Bowles: I will offer it in evidence, your Honor.

Mr. Pihl: We will object to it until such time as it is [14] shown, your Honor, when that was shown to the plaintiff.

The Court: Was that shown to you before you bought the policy?

The Witness: Yes, sir.

The Court: Do you happen to know when with reference to the date?

The Witness: It would be difficult to give you the exact date, sir. I didn't keep a note on that.

The Court: But you know it was not given to you after the policy was issued?

The Witness: No; it was not.

The Court: The objection is overruled. It will be admitted.

(Yellow sheet of longhand computations, schedule of dividends, previously marked Plaintiff's Exhibit No. 6 for Identification, was thereupon received in evidence.)

Q. (By Mr. Bowles): Did Mr. Reklau explain to you what the figures on the sheet represented?

A. Mr. Reklau took from that sheet figures in answer to questions that I asked.

The Court: Where is this list of questions that you asked him? You said in your deposition that you kept a book in which you listed a number of questions that you were going to propound to [15] him.

(Testimony of Virgil N. Lee.)

The Witness: We may have them in the papers, sir. I simply made notes on them, and, in addition, were these questions that I wanted to know about.

(Document presented to the Court.)

The Court: Have they been marked?

Mr. Bowles: They have not been marked, your Honor. They were just his notes.

The Court: Mark them.

(Document containing notes above referred to was thereupon marked Plaintiff's Exhibit 7 for Identification.)

Q. (By Mr. Bowles): Do you recollect without the aid of your notes any questions that you asked Mr. Reklau relating to this?

A. One of the questions was primarily if in the event of failure of this company, what protection did policyholders have, and Mr. Reklau informed me that it was very similar to a member of the Federal Reserve system in banking. In other words, if the company should get in financial straits or should fail, not the banking group but the underwriting group would simply step in and take over, and the policyholders would never know that the company had failed. We were protected to that extent.

Q. Did you ask him any questions relating to the dividend structure of this company?

A. Yes, sir.

(Testimony of Virgil N. Lee.)

Q. I will hand you what has been marked Plaintiff's Exhibit 7. [16]

The Court: Do you need it to refresh your memory?

The Witness: Not necessarily, your Honor.

The Court: Do not use it, then.

Q. (By Mr. Bowles): All right. What were the questions you asked?

A. One of the questions, to begin with, was how did we arrive at these very handsome profits that were indicated, and that is when were involved the factors, I believe, of lapses, company earnings, management, and increased new business, and this profit-sharing basis would give us far more handsome returns than ordinarily enjoyed by even a stockholder.

Q. Then did he tell you at any time what you could expect in the way of dividends from a policy such as he was proposing to sell to you?

A. By the third year he anticipated 25 per cent minimum returns on this investment.

Q. You state that Mr. Reklau took figures from this yellow sheet, which has been marked Plaintiff's Exhibit 6, in response to questions that you asked him?

A. Yes, sir.

Q. Do you know what questions you asked him?

A. The questions were on from one to five or seven or ten years what we might anticipate in this and out of this. He held that sheet himself, but he gave me the quotation on these figures based on the investment program set up and as it would apply

(Testimony of Virgil N. Lee.)

to [17] us being preferred individuals in the company, that it was a scale, but I did not get all the figures down.

The Court: Do I understand that it was anticipated that at the end of twenty years you would get \$443,373?

The Witness: That is the figures on the sheet, sir. He did not give me the exact amounts. We didn't reach that point.

The Court: That was a little too much for him?

The Witness: Yes; that was a little rich.

The Court: That was for only paying a thousand dollars for three years?

The Witness: No, sir; that was twenty years.

The Court: Yes; you would pay the thousand dollars every year, though?

The Witness: Yes, sir.

The Court: At the end of the sixth year you would get back \$1,318?

The Witness: I believe the figure is approximately correct, sir.

The Court: At the tenth year you would pay them a thousand dollars, and they would pay you \$7,488.65?

The Witness: If that is included in the sheet, that would be the figure.

The Court: Didn't you get rather suspicious when he was giving you these figures?

The Witness: Yes, sir; and I tried to ascertain the position [18] of the company and its worthiness, its integrity.

(Testimony of Virgil N. Lee.)

The Court: How did you do that?

The Witness: Through The First National Bank, a representative, the financial adviser; through the Weatherly Insurance Agency, through the brokerage house of Foster & Marshall, and then I believe the president of an underwriter's association, Mr. Sid Klein. I had a conference with him.

The Court: Did you tell him what representations were being made to you at the time?

The Witness: Yes, sir.

The Court: What did they tell you?

The Witness: I was either lucky or foolish, they didn't know which, to be able to get hold of something as good as this. If it was valid, it was extremely good; if not, then it was not good, but I could not find anything to militate against the company.

The Court: You didn't talk with Mr. Bowles at that time, though, did you?

The Witness: At that particular time I don't believe I had. Later Mr. Bowles and I discussed the matter.

The Court: Was that before you took out the policy?

The Witness: After I had taken my policy, sir.

The Court: I assume that because he is in court here now, but did you really believe that when you paid a thousand dollars a year that at the end of the tenth year you would be getting [19] back, if everything worked out all right, about \$7,500?

The Witness: Individually, and, as I recall my

(Testimony of Virgil N. Lee.)

figures, no. That was, that figure would be approximate for my son and for myself. I had a policy for him.

The Court: That is for the two of you?

The Witness: Yes, sir.

The Court: How old was your son?

The Witness: He was nine at the time, I believe, sir.

The Court: Were you paying a thousand dollars for him, too?

The Witness: Yes, sir.

The Court: Did you ever ask them for a form of policy that you were going to get, or an agreed contract?

The Witness: I did, sir, and I asked for a financial report from the company to see what the company was doing.

The Court: Did you get them?

The Witness: No, sir.

The Court: Proceed.

Q. (By Mr. Bowles): You say that Mr. Myers discussed this policy with you and the dividend structure after it was delivered to you?

A. As I recall, yes, sir.

Q. Did you have conferences with respect to the dividends immediately after the policy was delivered, with Mr. Reklau? A. Yes, sir. [20]

Q. Did they again go into this proposition of these—

A. Mr. Reklau—Mr. Myers did not at future dates because Mr. Reklau took over, and I did—

(Testimony of Virgil N. Lee.)

most of the business was transacted with him from that point on.

Q. I will ask you this: The representations that were made to you with respect to the investment potentials of this policy, did you rely on those statements in the purchase of your policy?

A. Yes, sir.

Q. You have already testified that you made such investigation as you could with respect to this company?

A. Yes, sir.

Q. Would you have purchased this policy had you known these statements were not going to be carried out?

Mr. Pihl: Your Honor, I object to that question as a leading question. He is leading the witness into an answer with this question.

The Court: I think he is not putting any words in his mouth.

Q. (By Mr. Bowles): What is your answer?

The Witness: No; I would not. I did not want insurance. As stated before, sir, I was looking for investment income.

The Court: This was better than an oil well, wasn't it?

The Witness: Slightly.

Q. (By Mr. Bowles): I will hand you what has been marked Plaintiff's Exhibits 8 and 9. [21]

The Court: Who gave you these figures in Plaintiff's Exhibit No. 6? Who handed them to you?

The Witness: The figures—you mean originally, sir?

(Testimony of Virgil N. Lee.)

The Court: Yes; whose writing is this?

The Witness: I do not know.

The Court: Who gave it to you?

The Witness: Mr. Bowles, I believe.

Mr. Bowles: No; you have testified, Dr. Lee——

The Witness: Oh, that—you mean originally, sir? That was the one that Mr. Reklau put before me and then took figures from. I didn't, other than to look at it and at a few columns there, I did not analyze the entire thing.

The Court: Did he give it to you to keep?

The Witness: No, sir.

The Court: This is what he took back?

The Witness: Yes, and then from that he took various figures to prophesy the future earnings of the policy.

Mr. Holman: Your Honor, we object to the admission of the Exhibit No. 9 in this case.

The Court: Apparently that is a mistake.

Mr. Bowles: I have the wrong letter marked.

The Court: 9 is withdrawn?

Mr. Bowles: Temporarily.

The Court: Is this company doing business in Oregon, the Equitable Life? [22]

Mr. Pihl: Yes, your Honor.

(Letter of January 20, 1959, to Dr. Virgil N. Lee from Equitable Life and Casualty, was marked Plaintiff's Exhibit 17-B for Identification.)

Mr. Bowles: This is Defendant's Exhibit 17 as it is already listed in the pretrial.

(Testimony of Virgil N. Lee.)

The Clerk: I have already marked it Plaintiff's Exhibit 17.

The Court: Is this different? What is it you want to know from this?

Q. (By Mr. Bowles): Together with Plaintiff's Exhibit 8, did you receive the letter and the check?

A. Yes, sir.

Q. Did you receive previously a check from the defendant insurance company?

A. Yes, sir; same amount.

Q. What amount? A. \$100.

Q. Approximately what time was that received?

A. At about the time the third-year premium was due.

Q. Did you cash that first check?

A. I applied the first check to the third-year premium, sir.

Q. In other words, for the third-year premium you only paid actually \$900? [23]

A. \$900 plus this dividend check.

Mr. Bowles: We are going to offer Plaintiff's Exhibit No. 5, Plaintiff's Exhibit No. 8, and Defendant's Exhibit No. 17-B (sic) into the record at this time, your Honor.

The Court: Is there any objection?

Mr. Pihl: We would like to look at it. We have no objection to 5, your Honor.

Mr. Holman: Your Honor, this is not a defendant's exhibit here, 17-B. We never listed that as an exhibit. This is one year later, and letter and check of Exhibit 17, which—this is a second dividend

(Testimony of Virgil N. Lee.)

check here and letter, and the first was January, 1958. This is January, 1959. We have no objections to it other than that; just the proper listing of it.

The Court: It is admitted.

(Letter previously identified as Plaintiff's Exhibit 17-B for Identification was thereupon received in evidence.)

(Check payable to Dr. Virgil N. Lee for \$100, numbered G84741, previously marked Plaintiff's Exhibit 8 for Identification, was thereupon received in evidence.) [24]

Q. (By Mr. Bowles): Are you prepared at this time to return the \$100 that you received from the company in January, 1958? A. Yes, sir.

Q. When was the first time that you learned that the company was repudiating the statements that had been made to you by Mr. Reklau with respect to dividends?

A. By the time the third share or premium was due. Before that it was impossible to pick it up for the simple reason we had nothing to go on, but when the dividends and earnings failed to materialize, that is the time I wrote to the head office to ask them what had happened to the dividends, why they had not been received.

Q. Had you paid your premium at that time?

A. I did pay the premium, sir.

Mr. Bowles: You may cross-examine.

The Court: When was that date, do you remember?

(Testimony of Virgil N. Lee.)

The Witness: It was around the 26th of January, I believe.

The Court: This year?

The Witness: No, sir; 1958, sir.

Cross-Examination

By Mr. Pihl:

Q. Dr. Lee, when was the first time that you saw an agent of the Equitable? You stated it was some time during the year 1955. Could you give us the month? [25]

A. As close as I could give you, sir, would be somewhere around the first of September.

Q. So that would be approximately September 1, 1955? A. I believe that is correct.

Q. You stated that that is Mr. Leo Rognlie?

A. That was Mr. Rognlie, yes.

Q. Was he by himself at that visit?

A. Yes, sir.

Q. I think you stated that you talked about health and accident? A. Yes, sir.

Q. When was the second visit from any agent from Equitable; just the month, the approximate date?

A. Well, some time later in the month, probably ten days to two weeks it might be, that Mr. Rognlie and Mr. Myers may have been at that time. I couldn't verify that accurately because I did not keep a record of it. It was casual conversation.

Q. When did you start keeping a record of these meetings?

(Testimony of Virgil N. Lee.)

A. I started taking notes and asking questions at the time I had decided if the policy was as it was represented I would take it. Then I was asking questions and endeavoring to obtain answers.

Q. What was the approximate date when you first started taking notes?

A. Oh, that would probably be around October, somewhere in [26] there.

Q. Some time in October, 1955?

A. Possibly so at that time.

Q. On this second meeting you say that Mr. Myers came with Mr. Rognlie?

A. As I recall it, sir.

Q. You discussed this policy which is in question today?

A. The profit-sharing policy was brought to my attention, and we began the discussions on the thing. The question was not as insurance as such but the fact that it was an investment-income thing which I was interested in and not as insurance.

Q. You stated on direct examination that they brought out certain dividend provisions which you would be entitled to? A. Yes, sir.

Q. And they gave you certain figures. Now, what did they base these figures on?

A. The volume of business, I believe, as near as I could understand, that the company was doing, and their anticipation of the tremendous increase in business.

Q. In other words, this money that you were to

(Testimony of Virgil N. Lee.)

receive by way of dividend was from anticipated earnings?

A. Not entirely; that to begin with the 3 per cent factor was in the policy, but the 8 per cent factor was there that was—well, I believe he assured that we would—8 per cent would be about the minimum we would receive. This is verbal and not in [27] writing; that is, I had no letters or documents from the agents or the company to sustain this, but I do have some notes to that effect.

Q. In other words, you were practically guaranteed an 8 per cent return on your premium; is that what you are saying?

A. That statement was made to me by Mr. Reklau, that he would guarantee a minimum of 8 per cent.

Q. When was the first meeting with Mr. Reklau?

A. That was after Mr. Myers had been in my office probably twice. I believe Mr. Reklau and Mr. Rognlie came together to discuss this profit-sharing policy. The exact date I can't tell you.

Q. This was before you purchased this policy that is in question today? A. Yes.

Q. You did purchase, as you have stated on direct, another policy?

A. Two policies were purchased, sir.

Q. You purchased one for your son?

A. Minor son, yes.

Q. When was that purchased?

(Testimony of Virgil N. Lee.)

A. That was approximately one year after I purchased my policy.

Q. Is it an identical policy?

A. Except for the age features, yes, and the interest which in his age group, which was 7.7, if I am correct, and that was in [28] addition to the regular 10 per cent dividend.

Q. I am talking about the policy itself. Was the policy the same except for the age of the insured?

A. Yes; that is, the premiums and such, yes, it would be the same.

The Court: Did you pay a thousand dollars a year for the boy, too?

The Witness: Yes, sir.

Q. (By Mr. Pihl): But the face amount is different?

A. It is much greater than my policy.

Q. That is, of your \$16,000?

A. Yes. His was thirty-five something.

Q. Did Mr. Reklau ever come to your office prior to the buying of this policy, unaccompanied by anyone else? A. Yes.

Q. When was that first visit by him alone?

A. Well, to quote you the exact date, sir, as to the other visits would be extremely difficult. I did not make a record of that exact date, but he was in my office a number of times alone.

Q. Before you purchased this policy?

A. Yes, sir.

Q. When is the first time you saw Plaintiff's

(Testimony of Virgil N. Lee.)

Exhibit, well, the one with the long columnar figures on it?

A. I would say that was probably the second or third time that [29] Mr. Reklau was in my office. He was alone at that time.

Q. When was that, approximately, in relation to the date you purchased this policy?

A. It would be very close to the purchase date.

Q. You did receive a dividend under this policy, did you not?

A. I believe it was classified as "President's Special Dividend."

Q. What was the amount of that?

A. \$100.

Q. You received that January 20, 1958?

A. Let's see; that would be at the end of the second year. Yes; that is the one I applied—

Q. Then you paid your third-year premium with that \$100 and \$900 more? A. That is correct.

Q. So you paid your third premium after knowing what your dividends were; correct?

A. I had no way of ascertaining what my dividends were. I wrote to the company and asked what it was, and at the same time I received the denial of all facts quoted to me.

The Court: Do I understand this correctly: You paid the \$100 that you received as a dividend plus \$900 more?

The Witness: Yes, sir.

The Court: For the third year, and at the same

(Testimony of Virgil N. Lee.)

time you wrote the company asking them where your other dividends were? [30]

The Witness: That is correct. I had to pay the third-year dividend to protect myself from loss of the policy and everything it represented until I could find out what this was all about. In other words, I was sustaining myself during that time.

The Court: Were you suspicious that the company was not going to be able to comply?

The Witness: My suspicions were around, sir, that something was wrong.

The Court: When?

The Witness: By the fact that I had not received any earnings in addition to the regular dividend.

The Court: When you got the \$100?

The Witness: Yes.

The Court: So, therefore, you wrote to the company, wondering where the other dividends were?

The Witness: That is correct.

The Court: Is it your testimony that prior to the time you received the \$100 dividend that you did not know at any time that the dividends that were represented to you would not be forthcoming?

The Witness: I did not, but I tried to find out by asking for a financial sheet from the company, a report on their business, but I didn't get it.

The Court: Then you wrote to the company for a statement [31] as to where the other dividends were, and at that time you learned from them that there were no other dividends?

(Testimony of Virgil N. Lee.)

The Witness: That is correct. They denied the existence of any such rate schedule, the age group, or anything else of that nature.

The Court: Then what did you do?

The Witness: Then I went to legal counsel and started operations. I went to the State to find out what they represented because the State officials had been in my office twice asking questions.

The Court: Before that time?

The Witness: Yes, sir.

The Court: In other words, prior to the time you got the \$100 dividend, the State officials were in your office?

The Witness: Yes, sir.

The Court: What did they tell you?

The Witness: They were investigating the company. They had various agents, the same agents that had discussed the thing with me, before the Commission down there, trying to find out just what was going on.

The Court: In other words, when you paid that \$900 you knew that the company was under investigation?

The Witness: I knew the company had been before the State Commission to ascertain various facts, but I was not positive. I had not been informed what these facts were. [32]

The Court: Why didn't you write to the company first and ask them what dividends they were going to pay?

The Witness: Well, according to the way the

(Testimony of Virgil N. Lee.)

information was given me, sir, they didn't know at the time, but it would be handsome. That was the expression used.

The Court: Proceed.

Q. (By Mr. Pihl): At any time did Mr. Ray Ross, General Sales Manager at Equitable, ever call at your office? A. Yes, sir.

Q. In person? A. Yes, sir.

Q. When was that?

A. The first time would be somewhere within around the end of the first year or early the second year. He complimented me most highly on how much good I had done the company by my good name and my position.

Q. Did you discuss dividends with Mr. Ross prior to receiving your first dividend check?

A. No.

Q. Did he tell you who determined the dividends? A. At the second meeting, yes.

Q. When was the second meeting?

A. I believe it is in a set of notes that I have there of the conversation with Mr. Ross, the exact date. Counsel could probably find it. [33]

Q. Do you need those notes to refresh your memory?

A. Not necessarily other than if you want me to quote exactly what questions were asked and the replies from Mr. Ross.

Q. What date was the second meeting? Would you look at the papers?

A. That was, wait a minute, it is listed here.

(Testimony of Virgil N. Lee.)

The Court: Was that after you paid your third premium?

The Witness: Yes, sir.

The Court: You may look to verify that fact.

The Witness: The date that Mr. Ross was in my office was February 12, 1958, 10:00 a.m., in the morning.

Q. (By Mr. Bowles): Was that his first meeting?

A. His second. That is after I had written to the home office to find out about these things.

Q. But before you paid your second premium?

A. No, sir; I had already paid the premium.

Q. You had already paid the third premium?

A. Yes, sir; that is due January 26th, as I recall.

Q. What was said by Mr. Ross at that meeting?

A. The first question was, "Are the dividends accumulative in successive years?"

Mr. Ross answered No, it can be—that is, \$100, 10 per cent, or \$200 the second year or whatever it happens to be in an increase as the shares of the unit came into effect. Now it can be 3 per cent as the policy indicates, if necessary. [34] The dividend is 10 per cent at present or \$100 per year regardless of the amount paid in; no earnings the first year due to the cost of handling the policy and such things as records in a business way. It might increase to 46 per cent dividend within the next two or three years, as in the case of the company in Oklahoma. That is when that statement was made.

(Testimony of Virgil N. Lee.)

The second question was, "Does the policyholder have any possibility of recovery of funds paid in when the policy was so old with fraud and misrepresentation by the district agent or agents of the company?"

"No," was his answer, "the company is not responsible for any statement made by its general agent or agents regarding the fraudulent or misleading statements. The policy contains a clause protecting the company against any such act or acts."

Q. Do you have notes of your first conversation with Mr. Ross?

A. No; there was no necessity for notes for the simple reason it was a complimentary call, and I was graciously then complimented for how much good I had done the company.

Q. Getting back to this long schedule in this columnar exhibit, you said, I believe, in response to a question by the Judge, that this was included for the two policies; right?

A. The same profit-sharing rate of earnings was to apply to both policies individually.

Q. On direct examination didn't you say that the figures which Mr. Reklau quoted to you were inclusive for the two policies? [35] The policies are separate and distinct entities?

A. My policy was one thing; that of my son, another; but the projection sheet or this yellow sheet as it is recognized, applied the same way to

(Testimony of Virgil N. Lee.)

either policy, not collectively, if that is the question you are asking, sir.

Q. Do you know as a matter of fact whether that is the exact figures that Mr. Reklau gave you? Is that the exact piece of paper?

A. It is a duplicate of it, so far as I can recall, sir.

Q. In other words, that is not the original of what Mr. Reklau gave to you?

A. I could not say that three years later, sir.

Q. Therefore, you don't know whether the figures on that are correct?

A. The figures, the beginning column of figures are the figures.

Q. You remember that?

A. I remember certain figures there. I did not keep the sheet. I didn't have time for that. It was shown to me then from that. The explanation of the potential and possible earnings of these policies and the volume of company business was projected for my benefit.

Q. Was not this when Mr. Reklau was talking to you about purchasing the second policy for your son?

A. I don't recall that having any influential bearing for the purchase of the second policy. I was asking questions primarily [36] for the first policy, my policy upon which I hoped to do financially well for my minor son.

The Court: There is a note here that, "This schedule was received about the middle of October,

(Testimony of Virgil N. Lee.)

1956, or the first of November." Was that just before they sold you the policy for your son?

The Witness: I don't recall the exact date of the purchase of his policy, sir. It was approximately one year later.

Mr. Bowles: January 20, 1956, your Honor.

The Court: Whose writing is that?

Mr. Bowles: Dr. Lee's.

The Witness: That is my policy, sir.

Mr. Bowles: I was going to explain to the Court that that particular sheet of paper was never in Dr. Lee's possession. I have other witnesses to explain when and how that came into being and where it came from.

The Court (Quoting): "This was given to me not later than one week after I took my licensing exam." When was that?

Mr. Bowles: That is what this witness will explain for you, also.

The Court: Is there any further cross-examination?

Mr. Holman: I am wondering, your Honor, if we could study the notes for a moment and then ask him questions concerning them?

The Court: Yes. [37]

Mr. Holman: If we could have a short recess to study them, we would appreciate it, your Honor.

The Court: When did you find out about these notes?

Mr. Holman: We didn't know what they were or where they were.

(Testimony of Virgil N. Lee.)

The Court: I found out about them in the depositions.

Mr. Holman: We will go through them rapidly.

The Court: Call your next witness. [38]

CECIL I. HUST

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

Q. Mr. Hust, what is your occupation?

A. I am an agent for Bankers Union Life Insurance Company.

Q. How long have you been in the life insurance sales business?

A. I started in September, 1954.

Q. For what company did you go to work when you started? A. Equitable Life and Casualty.

Q. Who was the agent, the general agent, for whom you worked? A. Walter A. Reklau.

Q. How long were you with that company?

A. I was with that company until about the middle of 1957. I dissolved partnerships with Reklau in January, 1957.

Q. During the course of that time where was the office of Equitable Life and Casualty Insurance Company in Portland?

A. At first it was in the Loyalty Building, and

(Testimony of Cecil I. Hust.)

then they moved to 32nd and Burnside on the East Side.

Q. During the course of time, was Mr. Ray Ross of the home office at any of your meetings here in Portland? A. Several times.

Q. Was the policy of insurance that we have been discussing here this afternoon, was that discussed by Mr. Ross with your [39] sales people?

A. Yes.

Mr. Pihl: Your Honor, I object to that question. It is not relevant whether or not Mr. Ross discussed this policy with the sales agents. The question here is whether certain facts were misrepresented to the plaintiff.

The Court: You are denying that the company is liable for it because it was made without authority, and he is trying to show, apparently, that when the sales manager—for instance, when the president of the company came out and told an agent to say something to a prospective customer, don't you think that the company would be bound by it?

Mr. Pihl: Yes, your Honor.

Mr. Bowles: That is precisely the question.

The Court: The objection is overruled.

Mr. Pihl: We have not denied the agency, though, your Honor. We have admitted that Mr. Reklau is our general agent.

The Court: Yes, but do you admit that any statements made by Mr. Reklau or by the other agents pursuant to Mr. Reklau's direction would be binding upon the company?

(Testimony of Cecil I. Hust.)

Mr. Pihl: Yes, those statements made prior to June 20, 1956, which was the date of issuance of the policy.

The Court: What is it you want to show by this witness?

Mr. Bowles: All I want to show is that Mr. Ross knew of this policy and made certain guarantees to the agents who were [40] selling it with respect to how long it would take this policy to be paid up. That is the question that would immediately follow.

The Court: The objection is overruled. I am going to listen to the testimony.

Q. (By Mr. Bowles): Were any statements made by Mr. Ross with respect to the length of time it would take this policy to pay itself out?

The Witness: Yes, sir.

Q. Will you tell the Court what they were?

A. Mr. Ross made a statement that it would pay itself out in approximately four years—four full premiums—I will retract that—four full premiums to be stretched over six or seven years, keep dropping each year.

Mr. Bowles: If the Clerk will hand Mr. Hust Plaintiff's Exhibit 6, please—

The Court: What is it?

Mr. Bowles: It is that yellow sheet. That is the one.

(Document presented to the witness.)

Q. (By Mr. Bowles): Were those sheets in use during the time that you were selling for Equitable Life and Casualty Company?

(Testimony of Cecil I. Hust.)

A. They were issued, I think, to every salesman.

Q. By whom?

A. They were issued by Mr. Reklau.

The Court: Is there anything further? [41]

Mr. Bowles: That is all I have.

The Court: You may **cross-examine**.

Cross-Examination

By Mr. Pihl:

Q. When were those issued to each salesman?

A. The exact date, I would hesitate to even attempt to give you the exact date.

Q. So you don't know when those were issued?

A. They were issued shortly after we moved out to 32nd and Burnside. Now, the date of that I don't know. I have one.

Q. Would you look carefully at that exhibit, and do you note a notation on there? Do you notice a notation on there?

A. Well, there is two on here.

Q. Would you read them?

The Court: Who put them on?

Mr. Pihl: Yes, did you put them on?

The Witness: Did I put them on?

Q. Yes. A. These notes here?

Q. Yes. A. No, sir.

Q. Have you ever seen that particular form before? A. I have seen this form, yes.

Q. No, I mean the particular one, the one you have. [42]

(Testimony of Cecil I. Hust.)

A. Well, that would be hard to say. I have one just like it, if you want to see it, the same handwriting.

Q. You do not have the slightest idea when those were handed out by Mr. Ross? A. By who?

Q. You said Mr. Ross came——

A. I didn't say Mr. Ross.

Q. ——came to Portland.

A. I did not say Mr. Ross passed these out. I said Mr. Reklau.

Q. Mr. Reklau passed those out?

A. Yes, sir.

Q. You don't know when he passed them out?

The Court: He said shortly after they moved to 32nd and Burnside. You may develop that.

Q. (By Mr. Pihl): When did you move to 32nd and——

The Court: He does not remember.

The Witness: I don't remember the exact date.

Q. (By Mr. Phil): Do you remember the year?

A. I think it was—I think it was the latter part of 1955. I am not sure.

Q. Latter part of 1955. How long would you say "shortly" was; just estimate? You say it was shortly after you moved.

A. Well, they were given out about the time—they were breaking in or training three new salesmen, and they were given out about the time those three salesmen started, Mr. Nadeau, [43] Mr. Martin, and Mister—I can't think of the other one's name—because that is when they came out with

(Testimony of Cecil I. Hust.)

these, is when they were three new men. After we moved to 32nd and Burnside is the first I saw of them, anyway.

Mr. Holman: We will develop that later on, your Honor.

The Court: Very well.

Q. (By Mr. Pihl): When did you leave Equitable? A. It was along the middle of 1957.

Mr. Pihl: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Holman: May we have Dr. Lee recalled on continued cross-examination?

The Court: Very well. [44]

VIRGIL N. LEE

the Plaintiff herein, thereupon resumed the stand as a witness in his own behalf and was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Pihl:

Q. The figures which you have set forth in those notes relating to profits to be derived, do you find that page where in your own handwriting you have set forth certain figures?

A. Yes, there are several here, sir.

Q. All of those relate to anticipated profits, do they not?

A. These relate to anticipated profits and the ex-

(Testimony of Virgil N. Lee.)

planation of the figures that were given to me by the agents.

Q. Are you referring to that Plaintiff's Exhibit No. 6 now?

A. Not at this time. These were taken prior to that, various phases here.

Q. But these figures which you have are the expected earnings of the company?

A. Relatively so, yes.

Q. Now, the figures which the agents gave you, were they not the experience of other companies? There are, I think you said, fifteen companies or something like that?

A. That was in the book, *Hidden Ways to Wealth*, as an illustration on what the facts showed, what they had done.

Q. Did you actually expect to earn the money which was on Plaintiff's Exhibit No. 6, would you say? [45]

A. That was my expectancy, sir. That was the figure quoted to me by the general agent of the company. If it happened that way, very well, but I would be moderately satisfied with considerably less.

Q. In other words, you didn't rely on those figures there, did you?

A. I did not peruse the entire chart, so I could not give you the entire list of figures, but I did anticipate to receive a facsimile in a reasonable scale of returns.

Q. When you received your policy you did read it, did you not, Doctor?

(Testimony of Virgil N. Lee.)

A. I analyzed the policy as best I could, sir.

Q. Did you read that portion relating to dividend payments?

A. I read—I couldn't quote it to you, but I presume I read that.

Q. Do you recall what it said as far as who was to determine what the dividends were going to be?

A. Yes.

Q. What did the policy say in that respect?

A. As I recall now, the Board of Directors determined this. That's about all I could quote to you on it.

Q. In other words, it was silent as to amounts but just said that the Board of Directors would determine the dividends? A. I believe so.

Q. Did that arouse your anticipations? [46]

A. Not necessarily. If the word of the general agent and agents were to be accepted and the facts or figures quoted to me, the expectancy of the company, what they were doing and what they anticipated doing, then it would be—they could not write that in the policy I do not presume, but, nevertheless, they assured that that would be the case, that we could have these earnings.

Q. In other words, we are back to the story that all of these earnings were anticipated; right—anticipated future earnings?

A. Not necessarily so. May I correct that that a minimum of 8 per cent was quoted me, but 10 per cent was actually what was happening, and the 11.9

(Testimony of Virgil N. Lee.)

was a fact; that was established, as represented to me.

The Court: Are there any further questions?

Mr. Pihl: That is all.

The Court: That is all.

(Witness excused.)

The Court: We shall take a ten-minute recess.

(Recess taken.)

Mr. Bowles: I would like to call Mr. Hust back to the stand by reason of the fact that I have learned he has letters [47] in his possession that I thought were in the files of the State Department, and I want the notes of the State Department to be in here.

Mr. Holman: Your Honor, we have looked at these letters and would like to object to their admission.

The Court: There is no question about the identification of the letters?

Mr. Holman: I don't know who the signatures are, your Honor. I am not familiar with them, but we object to them on the ground they are immaterial and irrelevant in this case.

The Court: Let me see them.

(Documents presented to the Court.)

Mr. Holman: What we are concerned with in this case is the representations made by particular agents, which the plaintiff has named, that were

made to him in the course of selling this insurance policy.

There is nothing in there about representations made to Dr. Lee in the sale of this policy, and I cannot see that these letters should be admitted for any reason. Mr. Hust had no contact whatsoever with Dr. Lee. He did not sell the policy to him, and what bearing these letters can have on that I do not know.

The Court: Recall Mr. Hust. [48]

CECIL I. HUST

was thereupon recalled as a witness in behalf of the Plaintiff and, having been previously duly sworn, was examined and testified further as follows:

The Court: When was the policy received by Dr. Lee?

Mr. Bowles: Shortly after the date—it is in January of 1956, your Honor. These letters, of course, bear a date subsequent to that, but what we are offering them for is just to show the consistent policy in backing up the statements and figures that were made to Dr. Lee.

The Court: I am going to overrule the objection and permit them to be admitted.

(Letter of February 13, 1956, from Equitable Life and Casualty Insurance Company to C. I. Hust, previously marked Plaintiff's Exhibit 10 for Identification, was thereupon received in evidence.)

(Photostatic copy of letter of February 9, 1956, from Equitable Life and Casualty Insur-

(Testimony of Cecil I. Hust.)

ance Company to Walter A. Reklau, previously marked Plaintiff's Exhibit 11 for Identification, was thereupon received in evidence.)

The Court: That is all.

Mr. Bowles: You may step down, Mr. Hust.

Mr. Pihl: Your Honor, I would like to ask Mr. Hust one question. [49]

Q. Mr. Hust, did you ever use the figures that you have testified to here today in the sale of any policy?

The Court: That would not make any difference. That is immaterial to this case whether he sold them to somebody else. That is immaterial.

Mr. Pihl: Your Honor, what I am trying to show is that Mr. Bowles has said this has been a consistent policy of the company, and I wanted to find out if other agents used these figures, too, as part of their sales pitch, as Mr. Bowles refers to it.

The Court: The question is did Mr. Reklau use it.

Mr. Pihl: Or Mr. Rognlie or Mr. Myers, yes.

The Court: What Mr. Hust did would be of no consequence to me at all. It would be of no consequence to the case. That's all.

(Witness excused.) [50]

NEIL D. NADEAU

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

Q. Mr. Nadeau, what is your occupation, sir?

A. Well, at the present time I am an underwriter for Bankers Union.

Q. How long have you been in the life insurance sales business?

A. I have been in the life insurance sale business since August or September of 1956.

Q. Whom did you first go to work for; what company did you first go to work for in that business?

A. Equitable Life and Casualty.

Q. Who was the general agent when you first went to work?

A. Walter A. Reklau.

Q. That was in the Portland area?

A. That was at 32nd and East Burnside.

The Court: What do you want to develop by this witness?

Mr. Bowles: He is the witness that will identify Plaintiff's Exhibit No. 6, your Honor. It was his, that so-called pitch sheet they were asking questions relative to the——

The Court: This was sometime after the sale?

Mr. Bowles: That's quite right.

The Court: When did you get this pitch sheet or—— [51]

The Witness: This sheet was given to me the day that I went to work for Mr. Reklau.

(Testimony of Neil D. Nadeau.)

The Court: You don't know when, if ever, Dr. Lee got those figures, do you?

The Witness: No, I do not.

The Court: That is all.

Mr. Bowles: That is all.

The Court: Is there any objection?

Mr. Pihl: No.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Bowles: I have one more witness that I can call. His testimony will only be cumulative of what has already been given.

The Court: On what issue?

Mr. Bowles: On the issue of Mr. Ross making a statement with respect to what this policy would do.

The Court: When was the statement alleged to have been made?

Mr. Bowles: In 1953 or '54.

The Court: We will hear him on that. [52]

DON PRUITT

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: Were you ever employed by Equitable Life and Casualty Company?

The Witness: I have been; yes, sir.

The Court: During what years?

The Witness: Oh, from 1953——

The Court: Past 1956?

(Testimony of Don Pruitt.)

The Witness: Yes, I think it was in the summer or fall of 1957, your Honor.

The Court: Do you recall a meeting at which Mr. Ross was present?

The Witness: Several of them.

The Court: Do you recall a meeting at which Mr. Ross discussed the dividend payments in a 20-pay-life policy, profit-sharing policy?

The Witness: Yes, I do.

The Court: When did that take place?

The Witness: Well, I don't know that I can recall the exact date. He was present at several meetings at which various phases of the policy were discussed.

The Court: This 20-payment-life and profit-sharing policy was discussed?

The Witness: Yes, that was the only policy I had anything [53] to do with. That was the first policy they brought out, and that was the one that they sold for a number—or along until after I left the company.

The Court: Was this their principal policy? Was this the policy that they sold most frequently?

The Witness: That was the only policy they sold, the only policy they had any license to sell.

The Court: Did Mr. Ross give you an estimate of how much dividends would be payable on this policy?

The Witness: Yes, he did in various ways when I first went with the company.

(Testimony of Don Pruitt.)

The Court: When you first went with the company, you had what?

The Witness: I had a sheet there showing a record of a policy issued by the Kansas City Life Insurance Company, which this record showed that the Kansas City Life had paid dividends starting at 25 per cent the first dividend and increasing 15 per cent a year to the end of the 20-year period, and he made a statement that his company would pay at least as much in dividends as was paid by the Kansas City Life.

(Document presented to the witness.)

The Court: Did you ever see that sheet or a similar one?

The Witness: Not while I was employed by the company.

The Court: You never saw that?

The Witness: No, not this one. [54]

The Court: Did you see one like it?

The Witness: No, I never saw any record of this kind that I recall during that time.

This came up about the time that I was discharged by the company.

The Court: In connection with this 20-pay-life policy, did you understand that it was in the nature of a stock deal?

The Witness: No, there was no stock involved in any way that I know of. It was merely a straight insurance policy that would have paid out, would continue for the twenty years, and that the policy-

(Testimony of Don Pruitt.)

holder would get these dividends starting at 25 per cent and increasing 15 per cent a year to the end of the twenty years.

The Court: When would he stop paying the premiums, then?

The Witness: He would stop paying premiums, I think, in the eighth year. I think the policy would become paid up. You see, in this, with this policy you paid the first-year premium in full and the second-year premium in full, and after that your dividends started at 25 per cent and increased each year 15 per cent. At the end of the eighth year your policy would be paid up and you would have no more expense in connection with it, and your dividends would continue, and the excess of the dividends over the cost of the premium would be a credit to the policyholder.

The Court: In other words, if this policy was a \$16,000 [55] policy for twenty payments of \$1,000 each, this excess would be added to the face amount of the policy?

The Witness: I think you had the right of doing that. You could leave your dividends to accumulate there and become payable with the policy.

The Court: Will you speak a little louder? You had a right to that, and these dividends would be payable with the policy?

The Witness: Yes, they would be paid; you could leave them, or you could take them in cash.

The Court: Is there any cross-examination?

(Testimony of Don Pruitt.)

Cross-Examination

By Mr. Pihl:

Q. Just one question, your Honor. You say that this yellow sheet, Plaintiff's Exhibit 6, was passed out about the time you left the company?

A. I think, as I recall, that came out after I left the company.

Q. You said you left the company in 1957?

A. 1957, I think so.

Mr. Pihl: That is all.

The Court: That is all.

Mr. Bowles: That is the plaintiff's case, your Honor.

The Court: Plaintiff rests?

Mr. Bowles: Yes, your Honor. [56]

The Court: Mr. Pihl, call your first witness.

DEFENDANT'S MOTION FOR NONSUIT

Mr. Pihl: Your Honor, at this time defendant would move for a nonsuit by and for the reason that plaintiff has failed to prove the material allegations——

The Court: I think the plaintiff has amply proved it. The motion is denied. Call your [57] witness.

LEO H. ROGNLIE

a witness called in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. Would you state your full name, please?

A. Leo H. Rognlie.

Q. Where are you employed, Mr. Rognlie?

A. At the present time I am working for the Benefit Order of America.

Q. Is that an insurance company?

A. Well, partially insurance, and it is a benefit company.

Q. Were you employed by Equitable Life and Casualty Company? A. Yes.

Q. When were you employed by that company?

A. I started in in October, 1955.

Q. Do you recall the exact date in October?

A. No, I do not.

Q. What department were you employed in in the company?

A. Oh, I started in the hospitalization first.

Q. You sold, I take it, health and accident policies? A. Yes.

Q. Did you go through a training period?

A. Yes, I did.

Q. About what time in 1955 would you say it was when you first [58] went out and began to contact people for sales?

A. Oh, I imagine it must have been about a week after I had got in the Hospitalization Department.

(Testimony of Leo H. Rognlie.)

Q. Would you say that was still in October, 1955? A. Yes.

Q. Did you have an opportunity to contact the plaintiff, Dr. Lee, while working for Equitable?

A. Yes, I did.

Q. When was that?

A. It was either the latter part of December or first part of January. I don't know the exact time.

Q. Would you say it was some time roughly in December, 1955, that you contacted Dr. Lee?

A. Yes.

The Court: That is not what he said. He said it was either in December or January.

Q. (By Mr. Pihl): Do you recall?

A. No, I don't remember the exact date. It was either the latter part of the year or the first part of the new year.

Q. What was the occasion of that call?

A. Well, we were working on telephone leads on hospitalization, and one of the leads that I had from one of the girls was to call Dr. Lee's office or come by and explain our hospitalization policy at the time.

Q. Do you know how you get these leads? Does the party call [59] in to the company?

A. No, the girls call the people on the phone.

Q. Dr. Lee evidently said he wanted to talk to an agent? A. Yes.

Q. You went up to his office? A. I did.

Q. Was anyone with you?

A. I was all alone.

(Testimony of Leo H. Rognlie.)

Q. Was there anyone with the doctor when you talked to him? A. No.

Q. What was the gist of this conversation?

A. Well, the main talk was just in regards to hospitalization first, and, as I was sitting there talking with him, he was not interested in something of that type at that time, but he was interested in an investment policy of some kind.

Q. Was there any discussion of this investment policy?

A. Yes, I discussed what little I knew about the policy at the time with Dr. Lee, and I told him, naturally, I would have to bring somebody from the main office, which was on Burnside, to talk to him about it because I didn't know all the details.

Q. What did you tell him at that time about this policy?

A. I just told him it was a profit-sharing program the Equitable had, that they had on the market, and, naturally, it was only going to be a certain amount of it sold.

Q. Did you discuss any figures with him at this time? [60] A. No.

Q. What was the next occasion you had to visit Dr. Lee in time from this first visit—about how long was it later?

A. Oh, I don't know; maybe a week or ten days after that I seen him again.

Q. Now, you say you saw him? A. Yes.

Q. Was there anyone with you?

A. Not at that time, no.

(Testimony of Leo H. Rognlie.)

Q. Where did you meet him?

A. In his office.

Q. What did you discuss on this second meeting?

A. I discussed the profit-sharing program, what little I knew about it, said that I wanted to set up a definite appointment with him to bring Mr. Myers up.

Q. You say you discussed this profit-sharing plan again. Now, what did you tell him on this occasion about this policy?

A. Well, very little, because, naturally, I wasn't very well acquainted with it at the time.

Q. Did you discuss any figures relating to dividends? A. No.

Q. What was the next occasion that you saw Dr. Lee?

A. A week or ten days after that I seen him again with Mr. Reed Myers at the time.

Q. Where was this meeting? [61]

A. In Dr. Lee's office.

Q. Would you relate to the Court what took place at this meeting in Dr. Lee's office with you, Mr. Myers and Dr. Lee? Was he alone, Dr. Lee?

A. Yes.

Q. What took place in this meeting with you three?

A. I introduced Mr. Reed Myers to Dr. Lee in his office, and at the time Dr. Lee had been checking the company in regards to its financial standing, and so on, as he related to me, and then Mr. Myers

(Testimony of Leo H. Rognlie.)

took out the book that we used or that was used at that time.

Q. What book was that?

A. Well, it was a book showing different stocks and different insurance companies, what they had done in the past.

Q. Is that this Hidden Ways to Wealth that has been introduced in evidence?

A. Well, no, it was a separate book. The Hidden Ways to Wealth—it was discussed at the time——

The Court: What was this other sheet? Is it a sheet showing how much these companies made in the sale of their stock, how their stock has gone up from \$100 to \$1,000 in a certain number of years?

The Witness: Yes, sir.

The Court: It is The Phenomenal Growth of Life Insurance Stocks? [62]

The Witness: Yes, sir.

The Court: Is that document here? Is that one of the exhibits here?

The Witness: I don't see any.

The Court: Wasn't that one of those sheets we had here?

Mr. Bowles: I believe it is Plaintiff's Exhibit 5.

The Court: Have you got No. 5, that green one?

Mr. Bowles: No, that is 4.

Mr. Pihl: No. 5 is a booklet.

The Court: No. 5 is the Hidden Ways to Wealth.

Mr. Pihl: That's right.

The Court: That is not the one he was talking about. In other words, he showed him a little

(Testimony of Leo H. Rognlie.)

pamphlet or a booklet which told of the phenomenal growth and the value of life insurance stocks?

The Witness: Stocks, and also what had been done in profit-sharing by other companies in the past.

The Court: Profit-sharing of what kind?

The Witness: Supposed to be the same type of policy that he was sold.

The Court: Then what happened?

The Witness: Well, then, through the course of conversation and in looking over these different things that we had there, plus the policy——

The Court: Was the policy there showed to him? [63]

The Witness: A specimen policy was shown, yes.

The Court: What did he say about the specimen policy?

The Witness: Well, to him it looked very good.

The Court: To whom?

The Witness: To Dr. Lee.

The Court: To the man that was with you?

The Witness: Dr. Lee.

Q. (By Mr. Pihl): Was this other book, Dun's Reports?

A. Well, it was Dun's Reports. Well, there was ratings of other companies in those like Boston Mutual who had had a profit-sharing policy that paid out six or seven, eight, nine years. Not all of them were alike, and then either at the end of that meeting or the next one—I am not positive, but I think it was at that time that Dr. Lee signed an applica-

(Testimony of Leo H. Rognlie.)

tion, made an application for this profit-sharing policy.

Q. Did Dr. Lee have any information at his disposal that you observed while in his office?

A. Well, all I could see, he had some figures, and he also told me that he had checked with the bankers and the stockbrokers, and I don't know who else, in regards to our company and the opportunity it would give him not only as an investment but also insurance with it.

Q. So he told you that he had investigated the company? A. Yes.

Q. You believe that it was at this meeting that the doctor [64] signed the application?

A. As near as I could recall, yes.

Q. At any time prior to the signing of this application, was Mr. Reklau ever at a meeting with you and Dr. Lee? A. Not prior, no.

Q. When was the first time to your knowledge that Mr. Reklau and Dr. Lee met?

A. Well, I am not sure about the time he had moved, a month, two months, even three months after the sale had been made before Dr. Lee had a chance to meet Mr. Reklau for the first time.

Q. How do you know this?

A. Because I was the one that introduced him to Dr. Lee.

Q. Where did you introduce Mr. Reklau to Dr. Lee? A. In Dr. Lee's office.

Q. You know that it was subsequent or after the signing of this application?

(Testimony of Leo H. Rognlie.)

A. To the best of my memory, yes.

Mr. Pihl: Your Honor, might I have that long schedule?

(Document presented to Counsel.)

Q. Would you hand that to the witness, please. I ask you to look at Plaintiff's Exhibit No. 6, Mr. Rognlie? A. Yes.

Q. Have you ever seen that schedule of figures before? A. Yes.

Q. When did you first come into contact with that schedule? [65]

A. Oh, some time in the early part of 1956; I don't know, maybe April, May, something like that.

Q. You say about April or May of 1956?

A. April or May, because it had nothing else here. When Mr. Reklau handed it out to the different salesmen it was only a recommendation at the time to the effect that if the company could set it up and put so much dividends in the stock pool this is what it would earn.

The Court: Will you state that again: If the company would put it up in a stock pool?

The Witness: No, at the time we were instructed what they were trying to do in Salt Lake City would be to create what they called a stock pool there whereby you could use the dividends from the profit-sharing policy, a certain percentage of your dividends which would be put in the stock pool, and in the like manner of the records with those insurance stocks, which insurance companies generally buy

(Testimony of Leo H. Rognlie.)

from each other occasionally, pay that amount of dividend even if it started at \$10 the first year and each year went up, it would pay off in like manner as instructed in this projection.

Q. (By Mr. Pihl): So that related to a stock pool rather than this 20-pay-life policy?

A. That is right.

Q. To your knowledge, or in your presence, was that schedule ever shown Dr. Lee? [66]

A. Not that I know of, no.

Q. Did you have occasion to see Dr. Lee after the issuance of this policy?

A. Yes, a number of times.

Q. What was the gist of the conversations of these meetings?

A. Oh, he occasionally asked me how things were coming and how business was increasing because the main issue at that time they were selling in the State of Oregon was profit-sharing, 20-pay-life policies.

Q. Did you sell other policies, though?

A. We had other types of policies. Not all of them were licensed in the state yet.

Q. Go on about these meetings with Dr. Lee.

A. That's about the only thing that was discussed most times, was how was things and, I mean his, oh, he was interested naturally in seeing what the company was doing, and, naturally, we all assumed at the time, even I think the salesmen that were working, that periodically or, you might say, every year after the Board of Directors met and decreed whatever the dividend was going to be that

(Testimony of Leo H. Rognlie.)

each profit-sharing holder would be getting a notification of that fact, and that went on, oh, I don't remember, until I guess it was in the summer when I discussed with him in his office——

The Court: Discussed with whom?

The Witness: Dr. Lee in regards to another——

The Court: What summer?

The Witness: It was of 1956—in regards to a profit-sharing program for his son, and he told me at the time that he would be interested because the boy had some money in savings and may as well get in on something like this profit-sharing which would pay him more dividends than what the bank was paying him on savings. So at that time I brought Mr. Reklau up there with me and introduced him to Dr. Lee, and an application was made out for his son for the same amount premium-wise as Dr. Lee's.

Q. (By Mr. Pihl): You personally introduced Dr. Lee to Mr. Reklau?

A. As close as I can recall, yes.

Q. In the summer of 1956? A. Yes.

Q. Were you present when Mr. Myers was explaining the dividends to Dr. Lee in his office prior to the purchase of this policy in question?

A. I was.

Q. Did you explain—was it explained to him in your presence when the first dividend would be due?

A. Yes.

Q. When was the first dividend due?

A. At the end of the second year.

(Testimony of Leo H. Rognlie.)

Q. So, in other words, the first dividend would be due two [68] years from the time you were talking to him, roughly?

A. Well, the way it was explained to us by Mr. Reklau, that their first dividend would be due then at the end of the second year or within 90 days of the time they had paid their third one.

Q. So, in other words, you were talking about a period of about two years, two years and 90 days in advance? A. Yes.

Q. Did Mr. Myers explain to Dr. Lee where these dividends came from? A. Yes.

Q. What did he say to Dr. Lee in this regard?

A. Well, on the face of the profit-sharing 20-pay-life policy, which is boxed in, it shows the different parts of the insurance company and where they make their money, and anybody that was a profit-sharing policyholder would share in these different parts of the company where they received their profits from.

Q. Was any figure mentioned to Dr. Lee in regard to the dividends?

A. On the figures at that time, the one I remember was a 10 per cent dividend that had been already decreed by the Board of Directors.

Q. For the policy year 1955; would that be correct?

A. No, it would be for all the profit-sharing holders that had been in long enough to share in in 1956. It was a 1956 Board of [69] Directors in the decree.

Q. Would that figure affect Dr. Lee's policy?

(Testimony of Leo H. Rognlie.)

A. No, not at that time.

Q. Because he had to hold it two years, you said, to get the dividend? A. That is right.

Q. Was any other figure mentioned to Dr. Lee that you can recall?

A. Only in regard to other companies that had profit-sharing policies in the past. Some of them had paid ten, fifteen, twenty per cent. Some of them had gone over a hundred per cent or more even. Naturally, it was explained there was no way of knowing how high the dividends would go.

The Court: Did you tell him that this was a highly speculative deal and that he had to go in with his eyes open?

The Witness: It was explained to him at the time that, to begin with, it was an investment policy, and, secondly, it was insurance.

The Court: Primarily an investment policy?

The Witness: Yes.

The Court: Did you explain to him that the only policies that were authorized in the State of Oregon were these profit-sharing policies and that everybody in the State of Oregon who bought a policy would be entitled to have the guarantee, too?

A. No. [70]

The Court: You knew that, though, didn't you?

The Witness: No, I didn't.

The Court: Didn't you know that the only policy that was authorized in Oregon was this life policy, was the profit-sharing policy?

The Witness: No, at the time I didn't know that

(Testimony of Leo H. Rognlie.)

this was the main one that was licensed because I was new in the insurance business, only had been in a few months.

Q. (By Mr. Pihl): You were in the Health Department before at that time that this was sold?

A. Yes.

Q. Then you later transferred to the 20-pay-life?

A. When they closed up the Hospitalization Department in either January, the first part of February, I transferred then.

The Court: So you were not aware of the fact that since 1953 they had been selling these policies and that was the only authorized policy in Oregon?

The Witness: No, I didn't.

The Court: That is why you made a representation to him that naturally only a limited number of policies would be sold?

The Witness: That is what I was instructed.

Q. (By Mr. Pihl): Do you know how many policies were sold in the state?

A. No, I have no way of positively knowing. I know approximately there should be about 500, but a lot of them was broken-up [71] units.

Q. Were you instructed by the company to contact certain individuals?

A. Yes, we were instructed by Mr. Reklau at the time in our training to contact business people, or, you might say, people in just about every line of work because they represented under this profit-sharing program to have radiation for future business of other types of insurance.

(Testimony of Leo H. Rognlie.)

Q. Was it explained to you a limited number of policies were sold to certain individuals?

A. Yes, they had a chart in the office which showed how many were allotted to each county in the state according to a per capita basis.

Q. So they were actually limited?

A. Yes.

Q. Was there some kind of a program going on in the company at this time? Do you recall the instructions?

A. I don't understand what you have said.

Q. Was there some kind of a selling program going on in the company at this time?

A. Yes, we had. At times different prizes were set up, those that got the most volume of business and the most premiums, and different setups like that.

The Court: What commission did they pay on first-year premiums? [72]

The Witness: I was paid 50 per cent and nine and fives after that.

The Court: How much for renewals?

The Witness: Five per cent.

Mr. Pihl: I have no further questions, your Honor.

(Testimony of Leo H. Rognlie.)

Cross-Examination

By Mr. Bowles:

Q. To clarify one thing, Mr. Rognlie, when the policy was delivered your first-premium payment was due; was that the way it was handled?

A. Yes.

The Court: Yes, that is the way it is always handled.

Q. (By Mr. Bowles): But this dividend was not due until the time the third premium was due; is that correct? That would be at the end of your second year?

A. End of your second year; that's right.

The Court: You say you started to work for the company in about September or October of 1956?

The Witness: 1955.

The Court: 1955, and you contacted Dr. Lee several weeks after that?

The Witness: Yes, sir.

The Court: That was the first time you contacted him, and you contacted him with reference to an health and accident [73] policy?

The Witness: Yes, sir.

The Court: He told me he was not interested in the health and accident policy, but he was interested in an investment, and it was at that time that you talked to him about this profit-sharing policy, even though you yourself had very limited information concerning it?

(Testimony of Leo H. Rognlie.)

The Witness: That's right, sir.

The Court: Proceed, Mr. Bowles.

Q. (By Mr. Bowles): You say he went to work in October of 1955 for Equitable Life and Casualty Insurance Company? A. Yes, sir.

Q. How long were you employed by that company?

A. Until the 2nd of April, this year.

Q. In other words, you have just recently left them? A. Yes, sir.

Q. You only now are testifying from memory as to when you went to work for them. Haven't you any way of fixing that date?

A. The only way I would have an accurate check on it would be according to my license, and, as far as I remember, I got my first license in October, the first part of October, 1955.

Mr. Bowles: That is all.

Mr. Pihl: No questions.

The Court: That is all.

(Witness excused.) [74]

OSBURN R. MYERS

a witness produced in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Myers, where do you live?

A. 2010 Southeast Tenino, Portland, Oregon.

(Testimony of Osburn R. Myers.)

Q. By whom are you presently employed?

A. Well, I am associated with Bankers Union, but I don't know whether my license has been renewed this year with Equitable or not. I have not been informed. It probably has.

Q. What is your capacity with Bankers Union?

A. Special agent.

Q. What type of insurance are you selling for Bankers Union? A. Profit-sharing contracts.

Q. Profit-sharing contracts? When did you first go to work for Equitable Life and Casualty Company?

A. Approximately, that would be in June, 1955— or 1954, I believe. I am trying to remember when Mr. Reklau's office was over in the Loyalty Building. I believe it was in 1954.

Q. June of 1954? A. Yes.

Q. What type of policy were you selling?

A. At that time this individual profit-sharing contract that we are discussing here was just approved by your Insurance [75] Commissioner of this state. It was shown to me then, that they were interested in promoting it here, and it wasn't until that fall that I was able to start working with it, at the end of 1954.

Q. In the fall of 1954 the policy was approved, and you started working with it?

A. That's right.

Q. Was that your primary selling job, to sell a profit-sharing policy for the company?

(Testimony of Osburn R. Myers.)

A. Right.

Q. When was your first contact with the plaintiff in this case?

A. That was December of 1955.

Q. How was this first contact made?

A. Well, I have to go back a little ways in this respect, but in 1955, the summer of 1955, the Equitable Life and Casualty was interested in putting more premiums on the books than we were getting in the profit-sharing contracts, and, as such, we opened up the hospitalization program. That hospitalization program started approximately the first of November of 1955, and Mr. Rognlie then—well, around the 25th of October is when he came to work, I believe, and the 1st of November we were ready to go, and it was Mr. Rognlie who contacted Dr. Lee the first part of December, as he mentioned before, relative to an A & H program. [76]

Q. Then Mr. Rognlie took you to Dr. Lee for the first appointment in the latter part of December, 1955?

A. I would say it was about the middle of December.

Q. Middle of December, 1955?

A. Yes.

Q. Can you relate somewhat of your discussion with Dr. Lee concerning this policy?

A. Yes. When I went up there with Mr. Rognlie, why, Dr. Lee had his office free of patients. We discussed this profit-sharing program and that the profit-sharing contract as put out by Equitable

(Testimony of Osburn R. Myers.)

is based on the experience of other companies which have profit-sharing contracts, you see, every insurance company of any type at some time or another, in order to expand, had to place out in a specific area a certain number of these profit-sharing contracts. The purpose of these profit-sharing contracts was to go ahead and to place them with people of influence in a community so that our men that are selling regular, ordinary types of insurance, when they are selling that in that community we use these names as reference, use them as a referral so that we can sell our other types of insurance. That was explained also.

Q. To interrupt you for a minute, was this primarily to gain capital for the company, these profit-sharing policies?

Mr. Bowles: I object to that question, your Honor, because this man was only a salesman—— [77]

The Court: Objection overruled. Did you tell Dr. Lee that they wanted to gain capital for the company?

The Witness: No, sir; nothing to do with capital, sir.

The Court: Very well.

Q. (By Mr. Holman): Well, now, talking with Dr. Lee, did he ask you certain questions concerning the dividends feature of the contract?

A. Yes.

Q. Did you explain those features to him?

A. I did to the best of my ability, and Dr. Lee

(Testimony of Osburn R. Myers.)

was, to my knowledge, one of the best informed of any I have talked to. His questions were very intelligent and very direct, and I answered them in that manner.

Q. Well, now, was this at the first meeting you had with him? A. That's right.

Q. What information did he have at that time concerning the company and your policy?

A. Well, I don't believe at that time he had very much information because he said he wanted to think about it. I explained the program to him in the respect that where the profits come from, they come from mortality savings and the refunds and interest earned, and that's what constitutes the profit-sharing contract based on the ordinary 20-pay-life insurance program.

Q. Did you at this time explain to him that he was not buying stock in the company; that it was a profit-sharing contract? [78]

A. Well, I was positive he understood that. No mention of stock was made.

The Court: Why, then, did you give him that book, *Hidden Ways to Wealth*?

The Witness: That was given to me by Mr. Reklau, which was to be given to every prospective client.

The Court: Page 50 says,

“Let's start with Life Insurance Company of Virginia. This company organized in 1871. It took until 1917 to reach its total paid-in capital of \$800,000. As of December 31, 1957, it has paid dividends

(Testimony of Osburn R. Myers.)

in cash of \$31,000,000-plus, and in stock of \$11,200,000. On the contract mentioned, a rough evaluation of what we find mentioned above, each thousand dollars in original paid-in capital is estimated to be worth \$80,598 and has received \$38,984 in cash dividends. From here it looks more like \$119,000 from an investment of only \$1,000."

If he was not buying stock, why did you give him this book?

The Witness: The reason for that, your Honor, is this: Everyone that went ahead and was interested in profit-sharing contracts also had something definite in their mind as to payout and whether they would lose their money entirely, buying an insurance policy, and if I could show you the part I showed in [79] the book, is right here, and I only wish to quote one individual. Thomas Blackburn is one of the best authorities of legal life insurance people. Blackburn says on life insurance:

"In the bright lexicon of legal reserve life insurance there is no such word as failure."

My opinion was certainly that they couldn't lose their money.

The Court: Did you also tell them how much they could make?

The Witness: I told them no company can guarantee profits. They did expect to pay 10 per cent dividend to start with.

The Court: What about 11.9 per cent in his age bracket?

(Testimony of Osburn R. Myers.)

The Witness: I am not too familiar with that, sir. That was after my time.

The Court: You never heard of that?

The Witness: I heard of it afterwards, sir.

The Court: That was after your time?

The Witness: Well, after this sale is what I am referring to.

The Court: How long after the sale?

The Witness: Well, I thought that was bought out by Mr. Reklau—some time in March or April.

The Court: Of what year?

The Witness: 1956.

The Court: Well, actually, you were with the company for several years during which they were talking about this 11.9, [80] were you not?

The Witness: No, sir; they weren't—that 11.9, to the best of my knowledge, would be in respect to cash value, which this policy would automatically earn.

The Court: Is that what it says?

The Witness: I don't know whether it says it, but that is what I understand it.

The Court: It was not additional income?

The Witness: It would be additional 10 per cent, yes, it would in cash value that your policy pays, would be in addition to the dividend which is paid the individual.

The Court: When you went out to sell this policy, you knew the premium was quite high for what a man was getting, wasn't it?

(Testimony of Osburn R. Myers.)

The Witness: No, sir; it was not. That premium was based on a 20-pay-life policy irregardless of what type of contract you bought. Any company on a 20-pay-life program, the premium would be the same and fluctuate within two or three dollars.

The Court: You mean \$16,000 would be the amount?

The Witness: I think Dr. Lee's age was 53.

The Court: About 52.

The Witness: Well, that makes around \$62 a thousand.

The Court: You think that is a fairly good premium?

The Witness: That is a standard policy, your Honor, all [81] companies have had, unless you go into ordinary life or you go into term, but if you go into 20-pay-life the payments would be higher.

The Court: You put in \$20,000, and they pay you back only \$16,000?

The Witness: Yes, but, by the same token, if Dr. Lee had had it just a day after he signed the application, if he passed away, his beneficiary would have received \$16,000.

The Court: There is an insurance with it, too. You do not happen to know what the Bar Association is giving for \$10,000, \$100 for \$10,000?

The Witness: That's right; I think you will find that's mostly on a term basis for ordinary life, too.

The Court: Proceed.

Q. (By Mr. Holman): This was the first meeting that you had with Dr. Lee. We are talking

(Testimony of Osburn R. Myers.)

about the first meeting you had with Dr. Lee in which Mr. Rognlie brought you and introduced you to him, and you talked to him about the policy in general, and then he wanted you to come back again after he had thought about it and perhaps checked on the company; is that right?

A. That's right; he said he would let us know.

Q. Did he call you back again?

A. No, I believe Mr. Rognlie contacted him after the first—it was right around Christmas time, and he didn't want to be bothered with it and give him ample opportunity to look into it, [82] and it was some time after, approximately the 15th of January, I believe it was, that Mr. Rognlie had contacted Dr. Lee.

Q. Did you go with Mr. Rognlie again to see Dr. Lee?

A. Yes. That was on the 20th of January, 1956.

Q. Is that when he filled out the application?

A. That's right.

Q. So you only had two visits then with Dr. Lee?

A. That's right.

Q. Mr. Rognlie had perhaps three or four?

A. Well, Mr. Rognlie, I think, delivered the policy, and I think that one reason Mr. Rognlie was up there to see Dr. Lee was Dr. Lee was fixing his teeth, as I understood it.

Q. Did Mr. Reklau ever go with you at any time to see Dr. Lee?

A. Not with me. To the best of my knowledge, the only time that Mr. Reklau would have been to

(Testimony of Osburn R. Myers.)

see Dr. Lee, I believe, was as Mr. Rognlie said—I am not familiar exactly when, but I am positive that Dr. Lee had never met Mr. Reklau prior to our sale of the contract.

Q. Well, now, did you have anything to do with the sale of the policy to Dr. Lee's son?

A. Beg your pardon?

Q. Did you have anything to do with the sale of the policy for Dr. Lee's son? A. No, sir.

Q. You did not handle that sale? [83]

A. No, sir.

Q. This second meeting in which Dr. Lee signed up for the insurance, what representations did you make to him concerning the possible dividends that would be paid in the future by the company?

A. Well, all I remember is when I went in there Dr. Lee came out with "Best's Reports," which is what we call the Bible of the insurance industry. It gives an entire breakdown of every insurance company in the business, at present over 1,200 of them, and he had the information, and he said his investigation bore out the fact that it was probably all right, but he was suspicious of it because here is an organization that had only two or three million dollars on the books. That's the reason these contracts were being placed, to get more business, and as the company grew he would share in the profit proportionally. That is exactly what I told him.

Q. Was the understanding on your part that there would be only a very limited number of profit-sharing policies sold?

(Testimony of Osburn R. Myers.)

A. Yes, sir; I believe that.

The Court: What did you say?

The Witness: Yes, sir.

The Court: The only policies that you sold were profit-sharing policies?

The Witness: That's right.

The Court: That is the only policy you are selling now? [84]

The Witness: For Bankers Union, yes.

The Court: How about Equitable?

The Witness: They are not writing this any more. They are writing A & H, ordinary life.

The Court: They stopped these profit-sharing contracts?

The Witness: Yes; after receiving a certain amount of them, they stopped writing them, I think it was in September or November, 1957. You see, Judge, there couldn't be any profit if everybody had the profit-sharing contract. There has to be other business.

The Court: It is quite obvious to me.

The Witness: That's right.

Q. (By Mr. Holman): Can you clarify this business about that 8 per cent dividend and the 10 per cent dividend? When was that mentioned and in what meeting?

A. I don't know where the 8 per cent come from. I only know that I was informed by Mr. Reklau. You want to understand that Mr. Reklau was the General Agent for the company, and every Monday there were sales meetings, and at these sales meet-

(Testimony of Osburn R. Myers.)

ings the agents were informed what we should tell our clients in the process of selling an annuity, which in this case was a profit-sharing contract, and I don't recall anything about an 8 per cent. He said that he was informed by the main office in Salt Lake City that the first dividend would be no less than 10 per cent, and as time went on the dividends would be more, and that's exactly [85] what was stated.

The Court: Would the dividends be accumulative?

The Witness: Well, the dividends would be another matter. There is two ways of looking at cumulative business, which if they left them with the company one would be on top of the other, and that they draw interest on top. That's all it amounted to, but you can't have your cake and eat it, too. If you take your dividend, it has got to take twenty years to pay out. If you left the dividend to accumulate in the company, it would pay out in a much shorter length of time.

The Court: In other words, there was not the same amount of dividend each year. The more you paid in, the more dividend you got?

The Witness: No, sir; it was issued as a straight 10 per cent dividend. My understanding was that as the business would increase and the profits would be more, the profit-sharing contracts would receive more dividend, that dividend to increase each year, yes.

(Testimony of Osburn R. Myers.)

The Court: Take a look at that schedule, the yellow one. For what was that used?

The Witness: I beg your pardon?

The Court: Did you ever use that?

The Witness: No, sir.

The Court: You never sold from that?

The Witness: No; no, sir. [86]

The Court: You never heard of that?

The Witness: Oh, yes; I have heard of it.

The Court: You have seen it?

The Witness: Yes.

The Court: But you never used it?

The Witness: No, sir.

The Court: Why not?

The Witness: It is an impossibility, that is the first reason; secondly, I don't have to lie to sell my business. This thing here was placed out by Mr. Reklau to all the men in the office some time around March or May of 1956, and I told him at the beginning that that was something that should not be used, that that did not relate to what we were doing, but Dr. Lee's information in regard to this thing was through his personal contacts with Mr. Reklau after he had bought his first policy. Of that I am positive.

Q. (By Mr. Holman): Well, now, concerning these dividends, did you explain to Dr. Lee that they were to be anticipated in the future when he would receive them?

A. That's right; no company can guarantee its profits and results. They couldn't guarantee any

(Testimony of Osburn R. Myers.)

type of dividend. No company can, but that they were starting with a minimum of 10 per cent, and as the business grew the dividend could increase, become larger.

Q. So you showed him this material on other companies? [87]

A. Well, that material that was shown, as I mentioned, every company at some time or other had issued profit-sharing contracts to get established in the state, to create their centers of influence, and, as such, we used these as a comparison to show based on the experience of other companies exactly what they done and what we would expect to do proportionately.

- The Court: Are there any further questions?

Mr. Holman: No further questions.

Cross-Examination

By Mr. Bowles:

Q. Mr. Myers, isn't it a fact that these policies were sold as a unit or a part of a unit?

A. Yes, sir.

Q. In other words, you could have a unit that paid a thousand dollars premium annually?

- A. That's right.

Q. And it didn't make any difference whether you started at age 5 or age 65, it still paid a thousand dollars premium, didn't it?

A. Yes; that would be based on the age.

Q. So the age bracket didn't make a bit of difference?

(Testimony of Osburn R. Myers.)

A. Oh, yes; it determined the amount of insurance you were going to get.

Q. Yes, but as to the premium it didn't make a bit of difference, [88] did it? A. No.

Q. Were you ever present at any of the meetings at which Mr. Ray Ross attended these sales meetings?

A. No, sir; I wasn't, unfortunately. I would have liked to have been there.

Q. His attendance upon this meeting was prior to the time you came into the organization?

A. I didn't quite understand you.

The Court: No; he was there long after he left. Mr. Ross came to Portland long after you had been with the company, didn't he?

The Witness: No; he came to Portland frequently while I was with the company, but most of those were not from the standpoint of meetings. They were just talks with Mr. Reklau. Mr. Reklau was General Agent, and he would talk to Mr. Reklau about matters and took most of the boys out for supper.

The Court: But there would be times when he talked to the boys, the agents, and you were not there?

The Witness: Well, I was there once, but I didn't go to all of them.

Q. (By Mr. Bowles): Did you overhear him make any statement that this policy would be self-sustaining in four years' time? A. No, sir.

Mr. Bowles: That's all. [89]

(Testimony of Osburn R. Myers.)

Mr. Holman: One more question, your Honor, if I may.

The Court: Proceed.

Redirect Examination

By Mr. Holman:

Q. Later on were you made General Agent for the company here in Portland? A. Yes.

Q. When was that?

A. There was three of us made General Agents about, I would say that was in the first part of 1957, spring of '57.

Q. You held that job until you left the company?

A. Oh, I haven't left them yet. I just don't know whether my license has been renewed.

Q. That's all; thank you.

The Court: Does the defendant rest?

Mr. Pihl: No, your Honor; we would like to introduce this exhibit.

The Court: Have you another live witness?

Mr. Pihl: Yes.

Mr. Holman: We have one more witness, your Honor.

The Court: Call him.

Mr. Holman: He is on a plane, your Honor. He will be here the first thing in the morning.

The Court: No; this case finishes today. Call your next [90] witness.

Mr. Holman: That is all we have. We have one more exhibit.

The Court: Very well.

Mr. Holman: We want to call Mr. Bowles, your Honor.

Mr. Bowles: My signature is on the letter. There is no question about it.

Mr. Holman: We would like to introduce Exhibit No. 16, your Honor.

The Court: Very well.

(Thereupon, letter of January 19, 1959, to Equitable Life and Casualty Insurance Company, Salt Lake City, Utah, from Rollin E. Bowles, previously marked Defendant's Exhibit 16 for Identification, was thereupon received in evidence.)

The Court: Do you have any more witnesses?

Mr. Pihl: No, your Honor; other than Mr. Ross.

The Court: Where is Mr. Reklau?

Mr. Pihl: Mr. Reklau quit the company last year some time, your Honor, and to the best of our knowledge he is in the Midwest somewhere.

The Court: When did you hear that this case was going to be tried?

Mr. Pihl: Friday, about noon, when I found out, your Honor. [91]

The Court: Didn't you know that this case was set for trial this week?

Mr. Pihl: Yes, your Honor.

The Court: When did you find that out? Didn't I set this case a few months ago?

Mr. Pihl: No, your Honor. It was originally set for April 21st of this year. Mr. Bowles informed the Court by letter that he could not make it, and then the Court reset it for some time during the week. I believe the card read for trial during the week of April 13th. We found out it was today at 1:30 at about noon Friday. We checked with Salt Lake City, and we were informed——

The Court: I thought that this case had been set quite awhile ago. I am going to recess the trial until tomorrow morning to give Mr. Ross an opportunity to testify. We will recess until 9:30.

(Evening recess taken.) [92]

Morning Session

(Proceedings herein were resumed at 10:00 a.m. on April 14, 1959, pursuant to the evening recess, as follows:)

The Court: Mr. Pihl, you may proceed.

Mr. Pihl: I will call Mr. Ray Ross.

RAYMOND R. ROSS

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. You are Raymond Ross? A. Yes.

Q. What is your occupation, Mr. Ross?

A. I am Assistant General Manager, Superin-

(Testimony of Raymond R. Ross.)

tendent of Agents for the Equitable Life and Casualty Insurance Company of Salt Lake.

Q. That is the defendant in this case?

A. Yes.

Q. Do you know the plaintiff, Dr. Lee?

A. I do.

Q. When did you first meet Dr. Lee?

A. In October of 1957. [93]

Q. Where was this meeting?

A. In Dr. Lee's office.

Q. Here in Portland in the Weatherly Building?

A. I am not sure the name of the building, but it was here in Portland,

Q. Who introduced you to Dr. Lee?

A. I introduced myself to Dr. Lee.

Q. Was there anyone with you when you went up to this meeting? A. Yes.

Q. Who? A. Mr. Frank Wetzel.

Q. What was the occasion of this meeting with Dr. Lee in October, 1957?

A. It was in regard to some correspondence that we had had at that time.

Q. What was this correspondence?

A. He had several questions in regard to an insurance policy and also a \$2,000 investment that he had made with Mr. Reklau.

Q. Would you explain these two items to the Court.

A. Well, yes, Dr. Lee had several questions in regard to a life insurance policy which he carried with this company, and some time before my call he

(Testimony of Raymond R. Ross.)

had given Mr. Reklau, if I recall correctly, \$2,000 supposedly for stock, and he was concerned about it.

Q. Did you discuss this \$2,000 transaction between Mr. Reklau [94] and Dr. Lee with Dr. Lee?

A. Yes.

Q. Would you give the Court the gist of this conversation?

A. Well, Dr. Lee was concerned because he apparently thought he was buying stock in the Equitable, and I suggested to Dr. Lee that he got a note from Mr. Reklau and an assignment of Mr. Reklau's commissions with my company as a guarantee that he would be repaid the \$2,000.

Q. So you gathered from this conversation that Dr. Lee had loaned Mr. Reklau \$2,000?

A. No, no, I don't believe he did loan it. I think Dr. Lee felt that it was to purchase stock.

Mr. Bowles: I am going to object, your Honor, to that kind of testimony. What he thought Dr. Lee thought is not important here.

The Court: That is right.

Mr. Bowles: It is what Dr. Lee said or what was actually done.

Q. (By Mr. Pihl): What did Dr. Lee say about this transaction?

The Court: Aren't we getting far afield? Is that the case we are trying now?

Mr. Bowles: It has nothing to do with this at all.

Mr. Pihl: No, your Honor, but he went up there for two purposes, I understand, to see Dr. Lee relating to Mr. Reklau.

(Testimony of Raymond R. Ross.)

The Court: Mr. Reklau apparently got \$2,000 on a transaction [95] that has nothing to do with this case.

Mr. Pihl: Yes, your Honor.

The Court: Now, let's talk about the case.

Q. (By Mr. Pihl): What else, if anything, did you discuss with Dr. Lee in the October, 1957, meeting?

A. We discussed his policy, the dividend payable under the policy.

Q. What did you tell Dr. Lee about this policy and its dividends?

A. I told him that it was a profit-sharing policy, a participating policy. He asked me the question of what size dividend we were paying. I told him 10 per cent that year. He wanted to know whether or not his dividends would be based upon an accumulation of premiums in the years to come. I told him no.

Q. Was there anything else you told him about the dividends?

A. Yes, I told him that they could not be guaranteed; that it was impossible to guarantee earnings in the future.

Q. What did Dr. Lee say, if anything?

A. Well, he was quite disappointed. He told me that—after I had explained the policy in detail to him, he asked if there wasn't some way that—I beg your pardon, your Honor—that the \$2,000 he had given Mr. Reklau could be applied for his next

(Testimony of Raymond R. Ross.)

year's premium that was due in January. I told him no, that it was a separate transaction entirely. Well, he made the statement, "Well," he says, "I have got three months to decide whether or not to make my next premium payment." [96]

Q. This was in October, 1957? A. Yes.

Mr. Pihl: Your Honor, could I see Plaintiff's Exhibit No. 6, please?

Q. Mr. Ross, would you please look at Plaintiff's Exhibit No. 6. Have you had an opportunity to review it?

A. Yes, I have seen this before.

Q. When did you first see that?

A. In Salem, Oregon, at a hearing in the Insurance Department.

Q. When was that?

A. During the summer of 1957.

Q. During the summer of 1957. Now, did Dr. Lee mention this projection schedule to you during your meeting of October, 1957?

A. No, sir; he did not.

Q. He made no remarks about it at all?

A. No, sir.

Q. Did you at any other time have a visit with Dr. Lee?

A. Yes, I visited again with Dr. Lee, I believe, in February of 1958.

Q. That would be approximately a month subsequent to the first dividend payment, would it not, in January of 1958? A. Approximately, yes.

(Testimony of Raymond R. Ross.)

Q. So it was after that? A. Yes.

Q. What was the gist of your conversation with Dr. Lee at this [97] meeting?

A. At this meeting we discussed more than anything else the \$2,000.

Q. Were there any discussions about dividends relating to this 20-pay policy?

A. Not that I recall.

The Court: When was your first visit with Dr. Lee?

The Witness: In October of 1957.

The Court: That was before he made his next payment?

The Witness: Yes, sir.

The Court: You say he was primarily interested in the \$2,000 at that time?

The Witness: He was interested in both, your Honor.

The Court: You told him at that time that there was only 10 per cent dividend?

The Witness: Yes, sir.

The Court: Proceed.

Q. (By Mr. Pihl): Did you at any time discuss with Dr. Lee when this policy in question would be paid up?

A. Yes, he asked me my opinion in regard to that. I explained to him at that time that most participating policies paid up in approximately 16 or 17 years, but because of the special features of this policy there was a good likelihood it could pay up in approximately 14 years.

(Testimony of Raymond R. Ross.)

Q. When was this discussed? [98]

A. This was in October, 1957.

Q. You say you told him at that time that the dividends were not cumulative on premiums paid?

A. Yes, sir.

Q. Have you ever had any other meetings with Dr. Lee other than the two you mentioned; October, 1957, and February, 1958?

A. No, I don't believe I did.

Q. When you received the third-year dividend in January approximately of 1958, was there a letter accompanying that dividend payment from Dr. Lee?

A. No, sir; not to my knowledge.

Q. To your knowledge, there was no letter accompanying that dividend payment?

A. That is correct.

The Court: Did you get a letter from him shortly thereafter asking about the dividends?

The Witness: No, sir; the letter in regard to the dividend came before my first meeting with Dr. Lee.

The Court: Where is that letter? Do you have a copy of that?

Mr. Pihl: No, I do not, your Honor.

Q. Mr. Ross, do you know a Neil D. Nadeau?

A. Yes.

Q. In what capacity did you know Mr. Nadeau?

A. He was a salesman with Mr. Reklau's agency. [99]

Q. Would you hand the witness Defendant's Exhibit No. 18. The Clerk has handed you Defend-

(Testimony of Raymond R. Ross.)

ant's Exhibit 18 for identification. Would you identify that document?

A. Yes, it's a general agent's contract with Neil Nadeau.

Q. With Equitable Life and Casualty?

A. With Equitable Life Insurance Company.

Q. When was that agreement signed?

A. It is dated April 30, 1957.

Q. April 30, 1957? A. Yes, sir.

Q. Is that when Mr. Nadeau went to work?

A. Apparently.

Q. For your company? A. Yes.

Mr. Pihl: We will offer that in evidence.

The Court: Who is Mr. Nadeau? Is he a partner of Mr. Reklau?

Mr. Pihl: No, your Honor, he is the witness who testified here yesterday relative to this projection sheet being handed to him in 1955.

Mr. Bowles: No, he didn't testify that that was done in 1955. I don't think this has any bearing on the case, this particular document.

The Court: The testimony so far has been that this projection sheet was first made available after Dr. Lee purchased the [100] policy, so I don't know what the purpose of this interrogation is.

Mr. Pihl: Your Honor, I believe that the record will show that Mr. Nadeau testified yesterday that he went to work for Equitable Life and Casualty Company shortly after they moved to 32nd and Burnside, and all the testimony was that they moved to 32nd and Burnside in either October or Novem-

(Testimony of Raymond R. Ross.)

ber of 1955, and this exhibit shows that Mr. Nadeau did not go to work for Equitable until April 30, 1957.

The Court: How does that show that?

Mr. Pihl: Because that is his employment contract, your Honor, with the company.

The Court: He might have been working for Mr. Reklau prior to that time.

Mr. Bowles: That is a technicality.

Mr. Pihl: I will ask Mr. Ross.

The Witness: May I answer that, your Honor?

The Court: Yes, proceed.

The Witness: The rule of the company is that no man can work for us unless he has first of all signed a contract, or represent this company in any way.

The Court: I don't think you are getting any place because you are just proving that which I am already convinced of. He is not suing for his son in this case. That is a different case, I presume. [101]

Mr. Bowles: That is a different case, your Honor; yes, sir.

The Witness: No, sir.

Q. (By Mr. Pihl): What was the circumstance——

The Court: Why are you going into that? What did he testify to that is of any consequence here?

Mr. Pihl: Since your Honor has ruled that this didn't come out until after the policy was issued, this would have no significance, your Honor.

The Court: You do not have to tell me about these insurance agents.

(Testimony of Raymond R. Ross.)

Mr. Pihl: I have no further questions.

Mr. Bowles: There is nothing that I care to cross-examine on.

The Court: That is all.

Mr. Pihl: Your Honor, could I ask one more question?

The Court: Yes.

Q. (By Mr. Pihl): Are you familiar with the standard insurance rates for 20-payment-life policies?

The Witness: I am.

Mr. Bowles: I am going to object to any question on that line. That isn't the matter at issue here.

Mr. Pihl: Your Honor, I think it is important that the Court know what the standard rates are that they charge. [102]

The Court: I will let it in.

Q. (By Mr. Pihl): What is the standard rate for an insured at age 52 for 20-payment-life per thousand dollars?

The Witness: Under the Commission Standard Ordinary Table of 1941 it is \$62.21 a thousand.

Q. Did Equitable follow this rate? A. Yes.

The Court: Do all companies follow the same rate?

The Witness: No, sir.

The Court: Where did you say this rate came from?

The Witness: This is Commission Standard Ordinary Table of 1941 as used by New York Life at that time.

(Testimony of Raymond R. Ross.)

Q. (By Mr. Pihl): Did Equitable follow this New York Life Table? A. Yes.

Q. So the premium would be \$62.21 per thousand? A. Yes.

Q. What is the premium in Dr. Lee's policy? Do you know?

A. If I recall correctly, that is his premium per thousand.

The Court: This profit-sharing policy, how many times did you sell this policy in Oregon?

A. In Oregon?

The Court: Yes.

A. I believe we started the sale of that policy, your Honor, in 1954, and I believe it was 1957 when we discontinued it. [103]

The Court: In how many states are you licensed to do business?

The Witness: Eleven states, your Honor.

The Court: What are they?

The Witness: Washington, Oregon, Idaho, Nevada, Wyoming, Colorado, New Mexico, Oklahoma and Hawaii. Have I left one out—Arizona.

The Court: Did you sell these profit-sharing policies in Washington?

The Witness: No, sir.

The Court: You never sold them?

The Witness: No, sir.

The Court: How about in Idaho?

The Witness: Yes, sir.

The Court: For how long?

(Testimony of Raymond R. Ross.)

The Witness: Oh, I don't recall, your Honor; a short period of time.

The Court: In other words, this policy was never approved in Washington?

The Witness: Oh, yes, sir; it is approved in Washington, your Honor.

The Court: But you never sold any?

The Witness: That is correct.

The Court: What kind of business do you sell in Washington?

The Witness: We are primarily selling accident and health [104] insurance in Washington, term insurance, preferred ordinary. They are the regular portfolio.

The Court: How about California?

The Witness: This policy is approved for sale in California. We have never sold it.

The Court: How about Wyoming?

The Witness: Wyoming, it is approved. It has not been sold.

The Court: Your company deals mainly in health and accident?

The Witness: Yes, at the present time primarily, your Honor. We are a combination company.

The Court: How about Colorado?

The Witness: Colorado, we have sold a policy similar to this over there, and this policy is also approved in Colorado.

The Court: New Mexico?

The Witness: New Mexico, it is approved. We have not sold down there.

(Testimony of Raymond R. Ross.)

The Court: Where is your home office—in Utah?

The Witness: Salt Lake City.

The Court: Do you sell in Utah, then?

The Witness: Oh, yes.

The Court: This policy, I suppose, is sold in Utah?

The Witness: No, sir; it is not.

The Court: It has never been sold in Utah? [105]

The Witness: No, sir; not to any extent.

The Court: How did you happen to sell that policy in Oregon, then?

The Witness: The reason we have not sold it in these other states, your Honor, has been a question of manpower. We had an agency up there or made a connection with Mr. Reklau and allowed him to sell that policy up here to establish the company.

The Court: How old is the company?

The Witness: The company became a stock company in 1947.

The Court: How much business did you do in 1957?

The Witness: In 1957?

The Court: Yes.

The Witness: Our premium income, it was a little better than a million and a quarter dollars.

The Court: How much business did you do in 1956?

The Witness: In 1956, approximately six hundred sixty thousand.

The Court: Of that amount how much was done in Oregon?

(Testimony of Raymond R. Ross.)

The Witness: Offhand I wouldn't know, your Honor, but considerable because we have had so many active agencies up here. I would say that the business from Oregon during the year 1958 was more than double or triple any other business we did in any other state.

The Court: What was it in 1956?

The Witness: '56? [106]

The Court: Yes.

The Witness: I would assume that perhaps our income was approximately \$160,000 from Oregon.

The Court: You say you never saw Exhibit 6 with those figures?

The Witness: Not prior to the hearing at the Insurance Department in the summer of 1957.

The Court: Do you know who prepared those figures?

The Witness: I have learned since then that Mr. Reklau prepared them.

The Court: Have you ever seen that Exhibit 5 before?

The Witness: Yes.

The Court: At whose request were these documents distributed?

The Witness: At Mr. Reklau's request.

The Court: Did you know that he was having his agents sell by use of that?

The Witness: Yes.

The Court: That was approved by the company?

The Witness: Yes. May I explain that?

The Court: Yes.

(Testimony of Raymond R. Ross.)

The Witness: The individual profit-sharing policyholder receives dividends before the stockholders of any company. All this is is to show the true picture of what some companies in the insurance business have been able to do. Now, as a result [107] of my first statement which says that the policyholders receive their dividends before stockholders, as poof of that may I mention that up until 1957 this company had paid in excess of \$350,000 to individual policyholders, dividend, and less than \$82,000 to stockholders.

The Court: Up to 1947?

The Witness: 1957, your Honor.

The Court: What does that mean?

The Witness: It means that the policyholders share in the profits of the company before the stockholders.

The Court: In mutual companies they get all the money, don't they?

The Witness: Yes, sir; they do.

The Court: That is all.

Q. (By Mr. Pihl): Mr. Ross, would you examine Defendant's Exhibit No. 19 and identify that for the Court?

A. Yes, this is a dividend projection which was authorized for use by my company and was given to the boys to use to indicate what profits we expected to pay on that policy.

Q. Do you know who prepared that?

A. Yes, our actuary, Walter C. Green.

(Testimony of Raymond R. Ross.)

Mr. Pihl: We will offer that into evidence, your Honor.

The Court: Was that the one shown to Dr. Lee?

Mr. Pihl: That is the one approved by the company.

The Court: What difference would that [108] make?

Mr. Pihl: Your Honor, to show you what the actuary had determined would be the dividend under this policy.

Mr. Bowles: This was never shown to us.

The Court: Objection sustained.

Mr. Pihl: No further questions.

Mr. Bowles: I have no questions.

(Witness excused.) [109]

FRANK T. WETZEL

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. What is your occupation, Mr. Wetzel?

A. I am an attorney.

Q. Of what states are you a member of the Bar?

A. Utah.

Q. Where are you employed?

A. At the Equitable Life and Casualty Insurance Company.

Q. What is your position with the Equitable?

(Testimony of Frank T. Wetzel.)

A. I am General Counsel.

Q. Did you ever have any meetings with the plaintiff in this case?

A. I met him once in the fall of 1957 here in Portland.

Q. Who was at that meeting?

A. Dr. Lee, Mr. Ross and myself.

Q. Was that the meeting that Mr. Ross was referring to here on direct examination?

A. Yes, sir.

Q. You were present at that meeting. Would you tell the Court what was discussed at that meeting relating to dividend payments under this 20-pay policy?

A. Mr. Ross explained to Dr. Lee that the only dividend that [110] is authorized was the 10 per cent dividend—or 10 per cent annual premium; that it was 10 per cent of whatever the annual premium was, and payable on anniversary date.

Q. What else was discussed relating to dividends?

A. Relating to dividends? Oh, if you have any specific questions, I was only monitoring the——

Q. Did Dr. Lee have any questions?

The Court: I didn't hear what you were saying. What did you say?

The Witness: I wondered if he had more specific questions. I was monitoring the conversation. I don't think I said more than a half dozen words the whole time. My main interest was this \$2,000, to see whether the company was involved in that or not.

(Testimony of Frank T. Wetzel.)

Q. (By Mr. Pihl): But you did hear a conversation between Dr. Lee and Mr. Ross relating to dividends? A. Yes.

Q. Did you hear anything said about accumulative dividends?

A. I think that was mentioned. Of course, it was made quite clear to Dr. Lee that it was not paid on an accumulative premium but only on an annual premium. This appeared to be at least disappointing, perhaps shocking, to Dr. Lee.

Q. What did Dr. Lee say, if anything?

A. Well, concerning the policy he said, well, he said he didn't know what he was going to do about it, but he had several [111] months to decide what to do about it. The premium was not due until the first of the year, which gave him probably three or four months to decide what he wanted to do.

Mr. Pihl: I have no further questions.

Cross-Examination

By Mr. Bowles:

Q. How long have you been General Counsel for this company, Mr. Wetzel?

A. I went to work for them in June of 1957, about June 21st.

Mr. Bowles: That's all.

Mr. Holman: Would your Honor be interested in more insurance rates from other companies concerning 20-pay policies at age 52?

The Court: No.

Mr. Holman: We have one insurance agent here who will testify about other policies in other companies.

The Court: No, I do not think I need that.

Mr. Holman: The premiums are very much the same, your Honor.

Mr. Pihl: The defendant rests, your Honor.

(Defendant rests.)

The Court: Is there any rebuttal?

Mr. Bowles: No, I don't think we have any rebuttal, your [112] Honor.

The Court: We will hear you.

Mr. Bowles: With respect to this matter, I think we have amply justified the complaint that we have alleged and the facts that we have set forth here from the testimony of Mr. Hust who was with the company when their offices or general offices were in the Loyalty Building. He testified there that Mr. Ray Ross at a meeting in those offices stated that if it were possible under the law for him to guarantee, that he would guarantee that this policy would pay itself out in four years.

Mr. Pruitt testified the same, and that testimony has not been controverted. It was Mr. Pruitt who testified that a list similar to what has been marked as Plaintiff's Exhibit 6 was in use by him at the time the offices were still in the Loyalty Building. It was testified to the same effect by Mr. Hust.

It is quite likely that some of these people who have testified for the defendant never saw this list

until after they went to work at the office on Burnside Street; that nonetheless these other people did. The list was before them.

It is quite true that Mr. Nadeau didn't testify that he went to work before Dr. Lee's policy was sold to him, and we make no claim for that. It is only through him that I was able to find this one list. They were never left. It was Mr. Reklau who showed that list and explained its meaning to Dr. Lee, from [113] whence he gathered his information.

The Court: You have no evidence that this list was ever shown to Dr. Lee prior to the time he bought the first policy?

Mr. Bowles: That was his testimony.

The Court: Well, I don't believe it. I think Dr. Lee is obviously mistaken.

There are two policies here. Every bit of testimony here from your own witnesses, every witness called other than Dr. Lee, pointed out that this list was shown after he bought the policy. You have one witness who stands alone against every witness for plaintiff and defendant on that point? Isn't that right?

Mr. Bowles: That is correct.

The Court: I do not say that he is deliberately falsifying, but I just say—this is more important in connection with the Bruce policy—that obviously this man is mistaken.

Mr. Bowles: On that matter, of course, there isn't, that is only—the statement, the Plaintiff's Exhibit 6, only backs up the Plaintiff's Exhibits 4

and 5, I think they are. It is this "Hidden Ways to Wealth" and "You Have Been Nominated." Both of them carry out the same general scope of explanation, and those were in general use by the company in their sales program and their sales agents and left an indelible impression that this is something more than a life insurance policy, and [114] most certainly it is not because the rate was at least high by the standards that we know in the Bar Association, and that is the situation. We feel that we have proved everything necessary to sustain the allegations of our complaint.

The Court: How do you account for the fact that there is a dispute as to the testimony as to when he had a conversation with Mr. Ross and this man who is the attorney for the company? It appears that he had this conversation some three months prior to the time that he made the payment.

Mr. Bowles: That was the last premium payment, your Honor.

The Court: Yes, that is right.

Mr. Bowles: I think it was Dr. Lee's testimony that it was in the summer of 1957 that he had a conversation—or the fall of 1957, as I recollect it.

The Court: Didn't he at that time know that the company was not going to come through?

Mr. Bowles: His testimony was the very same thing that Mr. Wetzel testified which was that the only dividends authorized at that time was 10 per cent, still holding out a possibility that further dividends would be paid, and no knowledge. He had no knowledge of what dividend, if any, they were

going to pay until such time as they made the payment of that dividend prior to his premium date in 1958.

The Court: We will hear from you.

Mr. Pihl: Your Honor, I think that the defendant by the [115] greater weight of the evidence has shown that only two men in Equitable contacted the doctor prior to the date that this policy was written. They were Mr. Rognlie and Mr. Myers. These three gentlemen were the only ones, including the doctor, were the only ones connected with the evidence of this policy, and that evidence is further shown that if there was some mistake in the mind of the doctor regarding the terms and conditions of profit-sharing, that these were fully explained to him in October, 1957, and it was not rebutted by the doctor; that he said, "Well, I have three months more to make up my mind whether or not I am going to continue this policy." Subsequent to that time he did make his third annual premium payment in affirmation of this contract.

I believe, like he states, that all the testimony here, as far as Mr. Reklau, goes to time and place subsequent to the issuance of this policy.

The Court: Yes, but I think it is quite clear that they made false statements to him at first. You do not deny it, do you?

Mr. Pihl: Your Honor, I do not think that they were false statements.

The Court: Here are two men who testified. They pointed out that they gave him this booklet,

“Hidden Ways to Wealth,” and told him to get in on the ground floor because there was only a limited number of these policies. [116]

This is something more than puffing. These are deliberate misstatements. Perhaps not deliberate by the man who made them, but they were stimulated and the whole method of operation was of the same kind. For example, the fact that Mr. Reklau who was using this document at some time indicates that they were selling this policy by means of fraudulent representations.

It is a pretty thin reed upon which to rely to say that he made one payment subsequent to that time when Mr. Ross and another man, the general counsel, were monitoring the conversation. Dr. Lee, of course, was not a lawyer. He did not know what ratification means. He thinks he is a good business-man but looks at the wrong things when he went out to try to determine the soundness of a company. He was under the impression that he couldn't take any action unless and until he made the third payment. Under those circumstances, I am wondering whether as a matter of law he would be precluded from asserting original fraud or is he estopped from so doing under those circumstances.

Mr. Pihl: Your Honor, we have some points and authorities.

The Court: I will be glad to receive them.

Of course, what you say in Point No. 1 is true, that a certain amount of puffing is always admissible, but I am going to hold that the conversations went beyond mere puffing. I think the fact that

your agents used this document in selling insurance [117] is a badge of fraud, and I am going to hold that it was a fraudulent representation when they sold this policy because this man at that time indicated, and the testimony is clear from everybody, that when he was solicited for insurance he said, "I am not interested in insurance." That is what the agent said who called on him first, that Dr. Lee said, "I am not interested in insurance. I am interested in an investment."

This man says, "Oh, we have something for you. I don't know too much about it." The man said that, very frankly, he was going to find out about it for him.

This was a man who was not interested in some insurance. He was interested in making a lot of money. Usually those are the people who get hooked, but the representations that were made to him were that this is not of a speculative nature. I think that the remarks which were made subsequently are consistent with his understanding of the original conversation, and you cannot tell from looking at that policy that the statements are incorrect because when he looks at the policy and reads it in the light of statements that are made to him, he believes that this policy will do what he wants.

Now, what is your second point: "Dividend" is a widely known technical term and is related to problematical earnings and not absolutely to the payment of a fixed amount. That probably is true, but that has nothing to do with this case.

I am not impressed by the Anderegg case, that

by [118] retaining the policy for more than two years and by paying the premium, after being advised as to the payments, plaintiff waived misrepresentation and affirmed the contract.

The testimony is that the first time anyone told him that the dividend rate was 10 per cent and that was what was authorized was some three months before he made his last payment. At that time, they only told him what was in the policy; namely, that the Board of Directors would determine the dividend rate. He was under the impression, and he so testified, that until he made his third payment he had no right to any dividends. That was what was told him earlier.

The same applies to your next point, by paying a premium after receipt of the first dividend of \$100 plaintiff has waived any misrepresentations made and he affirmed the contract. That is the same point as Point No. 3.

Mr. Pihl: Yes, it is, your Honor.

The Court: There is no difference between them.

When one who claims the right to rescind acts with reasonable promptness, and if after knowledge he does any substantial act which recognized that the contract is in force, such an act would usually constitute a waiver of his right to rescind. I think that is absolutely correct, but you must show that after he was acquainted with all the facts he made the election.

Mr. Holman: Your Honor, could I make a comment on that?

The Court: Yes. [119]

Mr. Holman: The first case, *Herman vs. Mutual Life Insurance Company*, involved a case in which the agent in the selling of the policy showed a columnar analysis to the prospective applicant, and this was in the nature of prospective earnings proposed on returns of other companies and that particular company.

Now, it so happened that the earnings did not measure up to the returns after the applicant was sold the policy. He came in to rescind the policy because the earnings did not measure up to what was represented to him, and the Court held that he had no right to rescind as all this was was a prophecy of what the future earnings might be in the company.

The Court: How much did they estimate the dividends would be?

Mr. Holman: I do not recall, your Honor. The policy there was in force for five years, and he received, I believe, three dividends which were short of what he expected to receive.

The Court: If a mutual life man tells me, "You can probably expect 10 per cent dividend or 15 per cent dividend," and the company pays 6 per cent dividend, that is one thing. If the testimony is that the dividends are going to be so high that after the fourth year it is very unlikely that you are going to have to pay any more premiums and that the amounts which you will receive go up into astronomical figures, and then the dividend is only 10 per cent, that is a little [120] different picture.

Mr. Holman: Well, your Honor, I think the

plaintiff in this case after consulting his broker and the Insurance Commissioner and the other people and being advised that this just couldn't be, I doubt that he had the right to rely on any such——

The Court: He didn't say that.

Mr. Holman: He said it was so unlikely or it was just impossible, one of the two.

The Court: There is a rule with which you are well acquainted that as between a crook and a fool, the Court will favor the fool. That is the rule. Of course, Dr. Lee was a fool for entering into a contract like this, but what should I do? That is the law that is laid down in the State of Oregon.

Mr. Holman: Your Honor, Mr. Myers testified in this case. He was the selling agent, and he said it would pay out within ten to twelve years, and there was nothing said about four years on his part. I believe Mr. Myers is a very believable witness and very sincere.

The Court: I heard the testimony of all these people. I don't recall him saying that it would pay out in ten years and frankly I do not believe it will pay out in ten years.

Mr. Holman: He said ten to twelve, your Honor, as I recall. There are a number of other cases in this memorandum. There is the old Scott vs. Walton case.

The Court: Where? [121]

Mr. Holman: That is under Point 6, 32 Oregon 460. In all of these cases one has to act almost immediately after the discovery.

The Court: After the discovery? The testimony here is that Dr. Lee says he did not discuss it until after he wrote a letter to the company accompanying his third premium. Then they came back and told him that no such representations were proper; that the amount of the premium does not accumulate in the sense that with each additional premium payment you get a larger dividend. It was at that time that he learned for the first time that the representations were not correct.

Now, as opposed to that, we have the testimony of Mr. Ross and the lawyer who say that they told Dr. Lee that 10 per cent was the only rate that was authorized, but he knew from looking at the policy that the Board of Directors had to authorize the dividends. Is that the type of notice that you would say would deprive a man of his right to proceed? Does that constitute an election? A man who make an election has to be acquainted with all the facts.

Mr. Holman: Your Honor, in this case it is very conceivable that the dividends could be much, much greater in a year or two. It just depends upon the growth of the company. They started out with great expectations. They paid 10 per cent, which is a substantial dividend. It could be—there have been some other companies who have paid 46 per cent, the Oklahoma company. [122]

The Court: I assume that they paid 10 per cent from the year that they started doing business, but I find that the representations made here amounted to something more than puffing. I have told you that they went far beyond that.

The real question here is does the payment of the last premium under the facts as developed in this case constitute a bar to recovery. That is what I am going to look at. You can furnish me some authority, too, if you wish, Mr. Bowles.

Mr. Bowles: I would be pleased to, your Honor, except that I leave Sunday for Philadelphia, and I doubt that I can get them in.

The Court: We have the time.

Mr. Bowles: I will be back around the first of May.

The Court: I will return the first of June. I told you yesterday that I thought this was the type of case that should be settled. I am still of that opinion. I could decide this case in a couple days from now by examining the authorities myself. I may do it. If I do not decide the case within the next few days, you may submit your authorities.

(Trial concluded.)

[Endorsed]: Filed July 11, 1960. [123]

United States District Court,
District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE COMPANY,

Defendant.

and

Civil No. 211-59

MARGARET L. PAGETT,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSUR-
ANCE COMPANY,

Defendant.

Before: Honorable Gus J. Solomon, District Judge.

TRANSCRIPT OF PROCEEDINGS

April 19, 1960—10:00 A.M.

Appearances:

MR. ROLLIN E. BOWLES,
Of Attorneys for Plaintiffs.

MR. H. KENT HOLMAN,
Of Attorneys for Defendant.

The Court: This is the time set for the taking of testimony on the issue of damages in two cases. What are the names of the cases?

Mr. Bowles: One case is Virgil N. Lee vs. Equitable Life and Casualty, No. 10004. The other is Margaret L. Pagett vs. Equitable Life and Casualty Insurance Company, No. 211-59.

The Court: What was the face value of the policy in the Lee case?

Mr. Bowles: \$16,033.

The Court: \$16,033. That was payable at the end of 20 years?

Mr. Bowles: Yes, sir; or at paid-up insurance in that amount at the end of 20 years.

The Court: Just paid-up insurance?

Mr. Bowles: Yes, your Honor.

The Court: In the other case, Mrs. Pagett paid \$500 a year. How old was she?

Mr. Bowles: She was 44 at the date of issue.

The Court: How much insurance did she have?

Mr. Bowles: \$8,840.

The Court: That was because she was rated up? Ordinarily she would have gotten \$10,000; isn't that right?

Mr. Bowles: That's right.

The Court: Call your first witness. [2*]

EUGENE J. OVERMAN

a witness produced in behalf of Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Court: Mr. Overman is a trust officer at the United States National Bank. Are you an expert in life insurance?

The Witness: No, sir.

The Court: I don't think you are going to do us much good because here is the question we are going to propound to you, the only question we need: Assuming that a man 52 years of age, taking out a policy of insurance in the principal amount of \$16,033, payable at the rate of \$1,000 per year for a period of 20 years, the dividend for the first two years being 20 per cent of \$1,000 and thereafter during the life of the policy the dividends being 20 per cent of the amount of the premiums, excluding the first year's premium, and at the end of 20 years he would be entitled to a paid-up policy in the sum of \$16,033, what would a person have to pay to obtain such policy on the open market, assuming such policy were available? Can you answer that question?

The Witness: Well, your Honor, my thought or my information was that the interest rate guaranteed on this policy was a 20 per cent rate, and I was asked to come up here to determine if possible, from an investment banking standpoint, the investment phase of such a contract, that is, and if a policy guaranteeing 20 per cent is in excess of the

(Testimony of Eugene J. Overman.)

normal rate of return I was asked [3] to come up here to determine—

The Court: We will listen to you on that, but that is not the real issue involved in this case. I tried to make that clear to Mr. Bowles.

Mr. Bowles: I have the actuary from the State Department of Insurance here to answer that question, your Honor, and that is the question I understood the Court asked, what would be the value of this contract at its third anniversary date.

The Court: Third anniversary date?

Mr. Bowles: Yes. In the Pagett case it was March 31, 1958, and that would be the \$500 premium, your Honor.

The Court: Give him your hypothetical question.

Direct Examination

By Mr. Bowles:

Q. There has been testimony, Mr. Overman, that the policy of insurance with which we were involved was sold as an investment policy with an annual premium of \$500 per year, the anniversary date being March 31st, the first payment March 31st, 1955, of \$500, a similar payment March 31, 1956, and a similar payment March 31, 1958.

The Court: Nothing in 1957?

Mr. Bowles: Or 1957; I am sorry, your Honor.

It has been testified that there would be a 20 per cent dividend paid at the end of the second policy year at the time of [4] the payment of the third premium, and 20 per cent would be paid on

(Testimony of Eugene J. Overman.)

all premiums accumulative following that date through the life of the policy.

Can you tell us what the value of such a contract would have been on March 31, 1958?

A. As I understand the situation, on March 31, 1957, a 20 per cent dividend was paid on the first year's premium, which would be \$100. Then I assume on March 31, 1958, a 20 per cent dividend would then be paid on the total amount invested.

The Court: That is excluding the first year? That would be 20 per cent of \$1,000?

The Witness: Well, your Honor, as I have the problem, it is 20 per cent dividend on all funds invested each March 31st, so it would be \$500 invested on March, 1955, and 1956 and 1957, and this terminates it on March 31, 1958. I assume that the dividends at the high rate would have all been paid up to that time. Then we are concerned about the value of such a contract in subsequent years. We have assumed that a 4 per cent dividend rate would be the normal expectation. That rate of return is available from investment trust shares, so we have calculated the 20 per cent dividend payment contrasted with the same normal 4 per cent dividend payment on each year, subtracted the two, and then one comes to the problem of determining the present value of a future dollar; so we have then gone to Kent's 10-Place Interest and Annuity Tables, and determine the market value at [5] the 4 per cent discount rate to determine the present value of a future dollar. That has been our procedure of calculation.

(Testimony of Eugene J. Overman.)

Q. What did you find your value to be as of the dates stated of this contract?

A. Total value which we calculated was \$10,-880.44.

Q. With respect to the Lee case——

The Court: First let me give you a hypothetical question.

Assuming that a woman 44 years of age takes out a policy of insurance in the principal amount of \$8,840 payable at the rate of \$500 per year for a period of 20 years and that the dividend after the first two years would be 20 per cent of \$500 and thereafter during the life of the policy the dividend would be 20 per cent of the total amount of the premiums, excluding the first year's premium, and at the end of 20 years she would be entitled to a paid-up policy in the sum of \$8,840 and that the \$8,840 was a reduction from the usual amount of \$10,000 because she was rated up, what would be the value of the policy at the end of the third anniversary of the issuance of the policy?

A. Well, your Honor, that takes an actuary to answer that question. My testimony is only on the investment phase of a theoretical or actual contract wherever it guarantees 20 per cent return as contrasted with a 4 per cent return.

The Court: Let me ask you one other question: You assumed that there would be a 20 per cent return on every premium that [6] was made, and you do not exclude the first year's premium, do you?

(Testimony of Eugene J. Overman.)

The Witness: The statement is on all funds invested.

The Court: So that would be including the first premium of \$500?

The Witness: That is correct.

The Court: What would be your figure if you would exclude \$500 for every year?

The Witness: That can be readily calculated, but it takes quite a bit of doing because the amount is reduced.

The Court: Every year it would be reduced by \$500?

The Witness: That is correct.

The Court: That would be the largest sum. Would you say the figure would then run around \$8,000 instead of \$10,880?

The Witness: I would rather calculate that rather than estimate it.

The Court: You cannot give us an educated guess, then? Can you calculate it here, right now?

The Witness: Well, I can——

Mr. Holman: Does he have any tables with him?

The Witness: We have some tables, but they run out to ten places, and when you start calculating that we use a machine. To do it by hand is quite laborious.

Q. (By Mr. Bowles): How many dividends have you in your calculation accounted for, Mr. Overman? [7]

A. Sixteen. The first four dividends I assume were paid and were not entered into my calcula-

(Testimony of Eugene J. Overman.)

tions—or the first four years. As I understand, 1955 and 1956 there were no dividends, and 1957 there was a dividend on the first \$500, and in 1958 a dividend on \$2,000, but those have not been entered into the calculations at all. I assume they have been paid.

The Court: That is on the \$500 policy?

The Witness: Yes, sir.

The Court: What would it be on the \$1,000 policy?

The Witness: Assuming the same set of circumstances, the amount would be double \$10,880.44.

The Court: That would be about \$20,700?

Mr. Bowles: \$20,760.88.

The Court: Is there any cross-examination?

Mr. Holman: Yes, your Honor.

Cross-Examination

By Mr. Holman:

Q. You said this 4 per cent dividend rate was applicable, and you said it was normal. What is it normal for?

A. My statement was that the 4 per cent return was available from the investment trust shares which were available for purchase by an investor at that time.

Q. What are these investment trust shares that you refer to?

A. Massachusetts Investors, Inc., Investors Group Securities, [8] George Putnam Fund.

(Testimony of Eugene J. Overman.)

Q. Do they have an average 4 per cent return?

A. Approximately that.

Q. What you took, in effect, was a 4 per cent discounted dividend table; is that right?

A. What we did, we first figured the dividend at 20 per cent and then at 4 per cent, subtracted one from the other, and then we used the tables to determine the present value of a future dollar. The dollar which you have coming to you ten years from today is not worth a dollar.

Q. I realize that.

The Court: Do you think that 4 per cent is too high?

Mr. Holman: I am just trying to find out what he did here, your Honor.

The Court: The company guaranteed only 3 per cent. If you want him to take a 3 per cent calculation, it would be considerably more.

Mr. Holman: Well, did he take the 4 per cent discount and multiply that by 5 to arrive at the value.

The Witness: No, I assumed that—to take the first year, take March 31, 1959. At that time, as I understood the problem, there would be \$2,500 invested. 4 per cent of that would be \$100; 20 per cent would be \$500, so you have a differential of \$400 for a premium.

Then I took the \$400, went to the annuity tables to [9] determine the multiple, to determine the present value of a future dollar, and that multiple

(Testimony of Eugene J. Overman.)

was .9615384615, and multiplying that by 400 I came out with \$384.62.

Q. What is this table now? Is that the discount value? A. At 4 per cent; yes, sir.

Q. At 4 per cent, and you multiplied that times the \$400?

A. That's for the first year. Now, the next year you repeat the process. The next year the interest differential is \$480.

Q. Why didn't you multiply it at the time with the \$500?

A. Because each year you get a different dividend. Each year your dividend goes up because you have more money invested.

Q. But I do not understand why you subtract the 4 per cent from the 20 per cent?

A. To determine the amount of premium.

Q. The amount of premium?

A. Because your policy which guarantees you 20 per cent is worth more than one that you get only a 4 per cent return in trying to determine the value of the premium.

Q. What you are saying is that this policy, or whatever it is, is worth \$10,000 more in an investment in Massachusetts Investment Trust; is that about it?

A. What I am saying is that a contract which a 20 per cent guaranteed return is worth that sum more than a contract which [10] has a 4 per cent guaranteed return.

Q. What tables did you use?

(Testimony of Eugene J. Overman.)

A. The 10-Place Interest and Annuity Tables by Kent.

Q. Then you use the standard 4 per cent table?

A. 4 per cent discount table. They have it at varying interest rates. You can go from one-fourth of one per cent up to 10½ per cent.

The Court: Are there any further questions. Would there be any difference if you would consider the value as of the date of issue rather than four years or three years later?

The Witness: Well, your Honor, this is—my testimony is solely on the investment problem, not on the usual phase of the contract.

The Court: If you considered the value of the contract as of March 31, 1955, instead of March 31, 1958, would that make any difference?

The Witness: Yes, the value would be smaller.

The Court: The value would be smaller in 1955?

The Witness: Because we have to wait longer to get—

The Court: Would that be an appreciable difference?

The Witness: Modestly so, yes.

The Court: A modest difference. Would it amount to more than two or three thousand dollars?

The Witness: I would say No.

The Court: You have not taken into consideration the fact [11] that if a person died earlier, that they would be entitled to the full face of the policy?

The Witness: I have not, your Honor.

Mr. Holman: I understand what he is telling.

The Court: That is all.

Mr. Bowles: I have no further questions.

The Court: That is all, Mr. Overman. You are excused from further attendance at the trial.

(Witness excused.) [12]

FRANK HOWATT

a witness produced in behalf of Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Court: What is your occupation?

The Witness: Your Honor, I am the Actuary for the State Insurance Department.

The Court: Have you a degree in, what do you call it, actuarial science?

The Witness: No, sir.

The Court: Did you go to the University of Iowa?

The Witness: No, I went to the University of Oregon. I have passed the first four parts of the examination for the Society of Actuaries.

The Court: How long have you been with the State?

The Witness: Since last August.

The Court: Where were you before that time?

The Witness: I was with the Hartford Life Insurance Company for eleven years.

The Court: Have you determined premiums in connection with your work?

The Witness: Yes.

The Court: Proceed.

(Testimony of Frank Howatt.)

Direct Examination

By Mr. Bowles:

Q. Mr. Howatt, have you had an opportunity to examine the [13] files of the State Department of Insurance with respect to a policy issued to Margaret L. Pagett?

A. I have ascertained that a policy, which I was shown and which was stated to be identical to the policy in question, was filed with the State Insurance Department.

The Court: You may take the original and look at it.

The Witness: Yes, this policy is the same form that has been filed with the State Insurance Department.

Q. (By Mr. Bowles): What would have been the value of that particular policy on March 31, 1958?

A. On March 31, 1958, the cash surrender value of the Pagett policy would be \$442, excluding dividends and without regard to any indebtedness on the policy.

Q. Have you likewise had an opportunity to determine if a policy of that nature was filed with respect to Virgil N. Lee?

The Court: Why do you need that? The policy speaks for itself. He is not testifying to anything else than what is in the policy. Mr. Bowles, that is not what I wanted to know.

Let me ask you some questions. Assuming that

(Testimony of Frank Howatt.)

Margaret L. Pagett on March 31, 1955, purchased a policy of insurance of the kind that you have seen which calls for payments of \$500 annually at the age of 44, and at the end of 20 years she would have a paid-up policy of \$8,840 because she is rated up and ordinarily she would get a paid-up policy of \$10,000, what could she sell that policy for if she could have sold it and if it was [14] salable on the date she purchased it, having the terms and conditions set forth in that policy?

The Witness: Well, the best I can answer that is that from my experience the premium on that policy is a reasonable premium for the benefits provided in the policy.

The Court: In other words, she may not have lost anything, but she certainly couldn't sell it for a profit?

The Witness: Right.

The Court: Now, assume that on that date she bought a policy, and in addition to these terms she was to get 20 per cent of the premiums that she paid in, excluding the premium on the first year. What could she have sold that policy for on the date that she purchased it?

The Witness: Well, your Honor, I am not prepared to answer that question, but it would be a strictly arithmetical exercise to determine the value. If I understand your assumption, the first dividend at the end of the second year on one premium of \$500 would be \$100. At the end of 20 years it would

(Testimony of Frank Howatt.)

be 20 per cent of nineteen premiums, which would be \$3,800.

The Court: That is right.

The Witness: That would have a value substantially in excess of the sum of the premiums that she is paying, obviously. Disregarding interest, that simply adds up to \$19,000. Now, the value would be less than that because of the interest, but it might be in the neighborhood of, I hazard a guess of \$13,000. [15]

The Court: That is on the \$500 policy?

The Witness: Yes.

The Court: Asking you the same question as far as Mr. Lee is concerned, who was 52 years of age and paid a thousand dollars, at the end of 20 years he would get a paid-up policy of \$16,033 plus the premiums and the benefits set forth in the policy, could he have sold that policy at a profit?

The Witness: The same comments apply to that policy. The values, disregarding the insurance benefits, are double because of the double premium.

The Court: In other words, he could not have sold that policy for anything, the policy that he got. He would not have made a profit on this policy that he received from Equitable Life and Casualty Company?

The Witness: I fail to see how he could.

The Court: Actually, in actual fact, because of the administrative expenses during the first year and the various costs that are legitimately charged

(Testimony of Frank Howatt.)

to a policy, he would probably have had to settle for a loss, wouldn't he?

The Witness: That's right. There is no value to the policy itself until the end of two years or three years, I am not sure.

The Court: That is for the guarantee of the company?

The Witness: Right.

The Court: That is because on a policy of this kind [16] ordinarily a large slice is paid to the——

The Witness: Selling agent.

The Court: ——the selling agent, up to 80 per cent on these policies.

Now, assume that a man 52 years of age would put in a thousand dollars as provided for in that policy and he got a policy of \$16,033, and he paid the premiums at the rate of a thousand dollars per year for a period of 20 years and that the dividend for the first two years would be 20 per cent of a thousand dollars and thereafter during the life of the policy the dividend would be 20 per cent of the total amount of the premiums, excluding the first year's premium, and that at the end of 20 years he would be entitled to a paid-up policy in the face of the policy—that is, \$16,033. What would a person have to pay to sell a policy on the open market, assuming such a policy were available? Do you know that?

The Witness: No, sir. I do not. Well, I should say I simply don't know what a policy like that

(Testimony of Frank Howatt.)

would sell for. It would be substantially in excess, in my opinion, of the premium that was paid.

The Court: Assuming that a man could get a policy of that kind, what would he be able to sell the policy for on the date of its issue, assuming that he was in a position to sell it?

The Witness: Well, normally, an insurance policy is not transferable. All that he would be able to sell it for at any [17] time, I would think, would be the cash value actually promised by the policy, that is, he could assign the cash value of the policy.

The Court: What would his loss of the bargain be? That is what we are trying to find out. If a policy like that were written and a policy of the kind that was actually written, what would be the difference in the bargain or the benefit of the two policies? Would it be over \$20,000?

The Witness: Did you say would it be over \$20,000?

The Court: Yes.

The Witness: It would be in that neighborhood, I would think.

The Court: In the neighborhood of around \$20,000?

The Witness: Yes, sir.

The Court: Assuming that a man was promised and he thought he was getting such policy in the assumed question and he actually got the policy that was written, in your view, the loss that he incurred would be approximately \$20,000?

The Witness: Yes, probably in excess of that. I

(Testimony of Frank Howatt.)

am answering that on the basis that it appears to me that the premium that was paid was a reasonable premium for a participating life insurance policy with modest dividends and that anything that was promised in excess of that would be pure gain.

The Court: Are there any further questions?

Mr. Bowles: I have no further questions, your Honor. [18]

Cross-Examination

By Mr. Holman:

Q. This \$20,000 that you talk about, that would be contingent on Dr. Lee living, wouldn't it?

A. Yes.

Q. And the same would be true as far as Margaret Pagett is concerned?

A. Yes.

Q. Have you ever heard of a case where a company issuing a participating life insurance policy guaranteed dividends?

The Court: I have already decided that question, that your man was guilty of fraud. It does not make any difference. I assume that no company in its right mind would ever offer a policy of the kind that is described. You do not have to convince me of that.

Mr. Holman: Well, we do not have any exact figures yet, do we, on this thing from anyone?

The Court: That is right. Do you have any more questions of Mr. Howatt?

Mr. Holman: If you are convinced that no company would issue such a policy, then I don't need the answer from the witness.

The Court: No, but the question is not whether a company would issue it; but if it did issue it, what would be the value of the policy. That is the question we are trying to find out. [19]

Mr. Holman: I understand.

The Court: No company will issue that kind of policy, but when Ponzi sold stock to his people, no company would have issued the kind of agreement he described, and yet people bought and paid him money for it. That is all. Does the plaintiff rest?

Mr. Bowles: I would like at this time, in accordance with Rule 15(b), to enter a motion to amend the pleadings.

The Court: I think you are a little late now. I am going to deny your motion. Call your witness, Mr. Holman.

Mr. Holman: I have no witness.

The Court: I think, Mr. Bowles, that you are entitled to the full amount of your prayer in each case because it is considerably lower than what I would have allowed had you come in earlier with the benefit of the bargain theory because it seems to me that if this policy had been written the loss of bargain in the Lee case would have been at least \$20,000, and the loss of bargain in the Pagett case would have been at least \$10,000. However, as far as general damages are concerned in these two cases, you have asked for \$3,000 on the Lee case, and you have asked for \$1,000, I think, on the Pagett case.

I am going to allow these amounts plus interest. You have asked for punitive damages, too, have you not?

Mr. Bowles: I have, your Honor.

The Court: I don't know whether I can allow punitive [20] damages in this case, but I will take a look and see. You have asked for some \$10,000 in punitive damages in one case?

Mr. Bowles: Yes, I have.

The Court: I will let you know in the next couple of days whether I allow any punitive damages or not, and if so, how much.

Mr. Holman: Would you like any authority on that, your Honor, on punitive damages?

The Court: Yes. Have you any authority?

Mr. Holman: Not with me, but I can have it in the next day or so if you would like to have it.

The Court: That is fine. Is it your opinion that I cannot allow punitive damages?

Mr. Holman: Yes, your Honor, in this case it is; yes, your Honor. Punitive damages would not be allowable in this case.

The Court: I would like to have the authorities if you have them. Have you any authorities?

Mr. Bowles: None other than the general that punitive damages are allowable where fraud is found.

The Court: Selman vs. Shirley allowed punitive damages.

Mr. Holman: I know they did, your Honor. It has been our contention throughout this case that it has been more in the nature of a rescission action.

The Court: I decided against you on that. There is no [21] rescission. I hold that my ruling now is not on the basis of rescission.

Mr. Holman: I understand that, your Honor.

The Court: I am deciding on damages, and I am allowing the full amount of the damages that he requested on general damages without regard to the question of rescission. I have denied rescission.

Mr. Holman: Yes, I understand that. His plea was for damages which would amount to rescission damages, and on that basis I don't think he should be allowed punitive damages in this case.

The Court: Your point is that this is a rescission?

Mr. Holman: Yes.

The Court: I am going to hold against you on that.

Mr. Holman: I don't know whether the allegations are sufficient in the complaint for maliciousness, and so on, to support punitive damages.

The Court: If that is the case, I will let you amend and put the allegations in because I have heard the evidence.

Mr. Holman: We concede that *Selman vs. Shirley* is a leading case in Oregon. There is no dispute on that.

The Court: I am going to allow \$2,000 damages in the Lee case, punitive damages, and because of the smaller amount in the Pagett case I will allow \$1,250.

Mr. Bowles: Shall I submit appropriate Findings of Fact? [22]

The Court: You submit Findings of Fact and Conclusions of law, and I will sign them after you submit them to Counsel.

Mr. Bowles: Yes, sir; I certainly shall.

The Court: I understand, Mr. Holman, that your company man stated that the defendant will appeal this case to the Supreme Court of the United States. He will have that opportunity. There are other cases pending, and we will try the other cases, too.

Mr. Holman: That will be in May some time?

The Court: No, we will try the other cases the latter part of June. We will finish those cases also, and then you can appeal them also, if the rulings are the same.

I understand from you that the facts in all these cases are practically identical, are they not?

Mr. Holman: Well, I think there are different selling agents in these other cases, your Honor.

Mr. Bowles: The factual matters are the same, your Honor, and there are a number of cases that I have that will be filed promptly in this matter. There are now three that are to be for trial as soon as the pleadings and issues are made out, but the factual background is similar all around.

Mr. Holman: I would not say the facts are the same in each case, your Honor.

The Court: Very well. That is all.

(Testimony closed.) [23]

Reporter's Certificate

I, Gordon R. Griffiths, an Official Court Reporter to the United States District Court for the District of Oregon, do hereby certify that at the time and

place mentioned in the caption of the foregoing transcript I reported in shorthand all proceedings had and testimony adduced in the foregoing-entitled causes; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and the foregoing transcript, consisting of Pages 1 to 23, is a true and correct transcript of all said proceedings had and testimony adduced, and of the whole thereof.

Witness my hand at Portland, Oregon, this 10th day of June, 1960.

/s/ GORDON R. GRIFFITHS,
Official Court Reporter.

[Endorsed]: Filed July 11, 1960.

[Title of District Court and Cause.]

DOCKET ENTRIES

1958

Sept. 29—Filed complaint.

Sept. 29—Issued summons—to Marshal.

Oct. 3—Filed summons—with Marshal's return.

Oct. 17—Filed Answer.

Dec. 15—Entered Order setting for pretrial conference February 16, 1959.

Dec. 15—Filed deposition of Virgil N. Lee (for defendant).

Dec. 31—Filed deposition of Osbourne R. Myers (for pltf.).

Dec. 31—Filed deposition of Leo H. Rognlie (for pltf.).

1959

Feb. 16—Lodged Pretrial Order.

Feb. 16—Entered Order setting for trial April 21, 1959.

Feb. 25—Entered Order striking from trial calendar and resetting for trial week of April 13, 1959.

Apr. 10—Filed Petition for issuance of subpoena duces tecum.

Apr. 10—Filed and Entered Order for issuance of subpoena duces tecum.

Apr. 10—Issued 1 subpoena duces tecum and 1 copy to Clifford Ingham, Office of Oregon State Commissioner.

Apr. 12—Filed and entered Pretrial Order (Microfilmed June 30, 1960).

Apr. 13—Issued subpoena—3 copies—to plttf's. atty.

Apr. 13—Record of trial by Court; evidence adduced; Entered Order continuing to Tuesday, April 14, 1959, at 10:00 o'clock a.m.

Apr. 13—Filed and entered Amended Pretrial Order (Microfilmed June 30, 1960).

Apr. 14—Record of further trial by court; evidence adduced; arguments of counsel; submitted; Entered Order that pltf. submit authorities by June 1, 1959.

May 29—Filed Pltf's. Memorandum on Question of waiver in response to def't's. memorandum.

Sept. 23—Record of Opinion and entered Order that same be filed.

1959

Sept. 23—Filed Opinion.

Oct. 13—Filed def't's. brief re application of proper rule for measure of damages.

1960

Apr. 19—Record of court trial continued on issue of damages.

Apr. 19—Record of statement by Court regarding preparation of findings of fact & conclusions of law & judgment by pltf.

Apr. 21—Filed Cost Bill.

May 12—Received from Judge Solomon in New York.

May 12—Filed and entered findings of fact and conclusions of law (signed May 11, 1969).

May 12—Filed and entered judgment for plaintiff in the sum of \$3,000.00 general damages and \$2,000.00 punitive damages (order signed May 11, 1960) ntfd. and costs.

June 8—Filed defendant's notice of appeal.
(Served).

June 13—Filed supersedeas bond with approval of Judge East.

July 7—Filed appellant's designation of record on appeal.

July 7—Filed statements of points to be relied upon.

July 7—Filed appellant's motion for order to forward exhibits to Court of Appeals.

July 7—Filed appellant's motion to forward exhibits to Court of Appeals.

1960

- July 8—Filed and entered order to forward exhibits to Court of Appeals.
- July 11—Filed Transcript of proceedings, dated April 19, 1960.
- July 11—Filed Transcript of proceedings, of April 13 and 14, 1959.
- July 12—Filed Def't. Motion for extension of fifteen days' extension from date hereof, within which to file and docket appeal.
- July 12—Filed and Entered Order allowing deft. fifteen days' extension from date hereof, within which to file and docket appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Summons; Answer; Pretrial Order; Amended Pretrial Order; Defendant's Trial Memorandum Points and Authorities (not filed); Defendant's Additional Trial Memorandum on Question of Waiver or Affirmance of Fraud (not filed); Defendant's Brief Re Application of the Proper Rule for the Measure of Damages; Plaintiff's Brief Re Application of the Rule for Proper Measure of Damages (not filed); Opinion of Judge Gus J. Solo-

mon; Findings of Fact and Conclusions of Law; Judgment Order; Notice of Appeal; Supersedeas Bond; Statement of Points to Be Relied Upon; Appellant's Designation of Record on Appeal; Order to Forward Exhibits to Court of Appeals; Order Extending Time to Docket Appeal; and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 10004, in which Equitable Life and Casualty Insurance Company is the defendant and appellant and Virgil N. Lee is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcripts of proceedings of April 13 and 14, 1959, and April 19, 1960, together with Exhibits 1; 4 to 8, inclusive; 10; 11; 17-B (for plaintiffs) and Exhibit 16 (for defendant).

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of July, 1960.

[Seal]

R. DEMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17038. United States Court of Appeals for the Ninth Circuit. Equitable Life and Casualty Insurance Co., Appellant, vs. Virgil N. Lee, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 22, 1960.

Docketed August 10, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

